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ALEXANDER L. STEVAS,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY and
THE MONTANA POWER COMPANY, *Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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QUESTION PRESENTED

Licenses to construct and operate hydroelectric facilities are issued by the Federal Energy Regulatory Commission pursuant to Part I of the Federal Power Act. By January, 1980, there were some 490 major hydroelectric generating projects, located in 32 states, under license to private entities. The replacement value of those facilities is over \$21 billion. Because the Act establishes a maximum 50 year license term, a number of original licenses have expired and many more will expire over the next several years. Section 15(a) of the Act authorizes issuance of a new license to the "original licensee" or, alternatively, to a "new licensee." Section 7(a) of the Act provides that in issuing licenses to "new licensees" pursuant to Section 15, State and municipal applicants receive a statutory preference. The question presented here is:

Does the preference provided in Section 7(a) of the Act for a State or a municipality apply in a relicensing proceeding under Section 15 of the Act against an *original* licensee that is neither a State nor a municipality?

PARTIES TO THE PROCEEDING BELOW

A list of all parties to the proceeding below and the petitioners' subsidiaries and affiliates is contained in petitioners' appendix (Pet. App.) at 85a.

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Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

Utah Power & Light Company and The Montana Power Company petition for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, reported at 685 F.2d 1311 (11th Cir. 1982), is set forth in the petitioners' appendix (Pet. App.) at 1a. Federal Energy Regulatory Commission Opinion No. 88, "Opinion and Order Declaring Municipal Preference Applicable to Hydro-Electric Relicensings" (Opinion 88), issued June 27, 1980, is reported at 11 F.E.R.C. (CCH) ¶ 61,337, 20 Fed. Power Serv. (MB) 5-921, and is

set forth at Pet. App. 14a. Commission Opinion 88-A and Order Denying Rehearing (Opinion 88-A), issued August 21, 1980, is reported at 12 F.E.R.C. (CCH) ¶ 61,179, 21 Fed. Power Serv. (MB) 5-332, and is set forth at Pet. App. 79a.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1982, and is reprinted at Pet. App. 81a. A petition for rehearing and a suggestion for en banc consideration were denied without opinion on November 12, 1982. 693 F.2d 135 (11th Cir. 1982), Pet. App. 83a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES

Pertinent portions of the Federal Water Power Act (FWPA), ch. 285, 41 Stat. 1063 (1920), as enacted, are set forth at Pet. App. 87a. The FWPA became Part I of the Federal Power Act in 1935, Public Utility Act of 1935, ch. 687, Title II, 49 Stat. 803, 838-47 (1935), and was subsequently amended in several respects. Relevant sections of Part I of the Federal Power Act, *as amended*, 16 U.S.C. §§ 791-823a (1976), are set forth at Pet. App. 101a. The term "Act" is used herein to refer to both of these statutes.

STATEMENT

THE ISSUE

The controversy in this case involves the proper interpretation of the italicized language in Section 7(a), 16 U.S.C. § 800(a) (1976), of the Act:

In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and *in issuing licenses to new licensees under section 15 hereof* the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted, or shall within a reasonable time to be fixed by the commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region.

...

Petitioners contend that the express cross-reference in Section 7(a) to Section 15 leaves no doubt that Congress intended the term "new licensees" in Section 7(a) to have the same meaning it has in Section 15; that is, a "new licensee" is an entity other than the "original licensee." It is undisputed that Congress used the term "new licensee" in Section 15, as well as in Section 22, for the specific purpose of referring to applicants for a new license other

¹ Section 15(a), 16 U.S.C. § 808(a) (1976), provides:

That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, *the commission is authorized to issue a new license to the original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, *or to issue a new license under said terms and conditions to a new licensee*, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the *new licensee* shall, before taking possession of such project or projects, pay such amount as the United States is required to do, in the manner specified in section 14 hereof: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a *new licensee*, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

(Emphasis supplied.)

than the original licensee.² If, as petitioners argue, Congress intended the term “new licensees” to have the same meaning in Section 7(a) that it has in every other place it appears in the statute and throughout the legislative history, then the only reasonable interpretation of the phrase “in issuing licenses to *new licensees* under section 15 hereof” is that Congress intended to apply the municipal preference solely against applicants *other than* “original licensees.” Petitioners contend that this interpretation: 1) is required by the language of the statute, 2) is consistent with the legislative history, and 3) produces a reasonable result.

The Federal Energy Regulatory Commission³ interpreted the term “new licensees” as used in Section 7(a) to mean *any* applicant for a new license, *including the “original licensee,”* because the Commission believed Congress intended that the municipal preference apply against all private applicants for a new license. The Commission found that: 1) there is no reason to interpret the term “new licensees” in Section 7(a) to mean the same thing it means in Sections 15 and 22 of the Act; 2) the Wilson Administration intended the municipal preference to apply against original licensees, and 3) petitioners’ interpretation produces absurd results. *See infra* at 7-11.

² It is also undisputed that in amending the Act in 1968, Congress used the term “new licensees” in Sections 7(c) and 15(b) to distinguish between “original licensees” and other applicants.

³ Section 402(a)(1) of the Department of Energy Organization Act, Pub. L. No. 95-91, § 402(a)(1), 91 Stat. 565, 583-84 (1977), transferred the administration of Part I of the Federal Power Act from the Federal Power Commission to the newly-created Federal Energy Regulatory Commission. The term “Commission” is used herein to refer to both of these agencies.

As the Commission noted, the case presents a purely legal question:

Within the framework of this proceeding established by our order of May 3, 1979, we view our present role as being the same as that of the District of Columbia Circuit in *Chemehuevi Tribe of Indians v. Federal Power Commission*, *infra*. In other words, the principal question to be decided is not the policy issue of whether it is factually or politically wise for States and municipalities to have a relicensing preference against citizen and corporation licensee-applicants, but the legal issue of whether Congress included such a preference in Section 7 when it enacted the FFWA in 1920.⁴

STATUTORY BACKGROUND

The Federal Water Power Act of 1920 was enacted to encourage the investment of private capital to develop and utilize the vast energy production potential of the nation's hydropower resources. See *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 407 (1975). The FFWA established a licensing program for authorizing non-Federal hydroelectric development on Federal lands and navigable streams, while maintaining Federal regulatory oversight to ensure that such projects are built and operated in the manner which best serves the public interest.

The Commission may, under Section 4(f), 16 U.S.C. § 797(f) (1976), issue preliminary permits which grant the permittee a priority in subsequent licensing proceedings

⁴Opinion 88 at 10, Pet. App. 24a. The Eleventh Circuit agreed:

We are faced with a purely legal question regarding the statutory construction of section 7(a) of the Federal Power Act. . . .

Alabama Power Co. v. FERC, 685 F.2d 1311, 1312 (11th Cir. 1982), Pet. App. 1a (citation omitted).

for hydroelectric development under Section 4(e), 16 U.S.C. § 797(e) (1976). The Commission may license only that project which is "best adapted" to a comprehensive utilization of the water resource, subject to any conditions necessary to serve the public interest. Section 10(a), 16 U.S.C. § 803(a) (1976). Licenses may be issued for a maximum of 50 years. Section 6, 16 U.S.C. § 799 (1976).

Section 7(a), 16 U.S.C. § 800(a) (1976), provides States and municipalities⁵ a preference when competing with private citizen and corporate applicants: 1) in issuing preliminary permits, 2) in issuing licenses where no preliminary permit has been issued, and 3) in issuing licenses "to new licensees" upon expiration of original licenses. Section 7(a) further provides that as between other applicants, the Commission is authorized—consistent with the standard of Section 10(a)—to prefer the proposal "best adapted" to serve the public interest.

Upon the expiration of original licenses, several options are available, including Federal takeover pursuant to Section 14, 16 U.S.C. § 807 (1976), and relicensing, through issuance of a new license either to the original licensee or to a new licensee pursuant to Section 15, 16 U.S.C. § 808 (1976).⁶ Section 14(b) requires the Commis-

⁵ "Municipality," as defined in Section 3 of the Act:

means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.

16 U.S.C. § 796(7) (1976). States and municipalities are hereinafter collectively referred to as municipalities.

⁶ Section 15 also provides for issuance of annual licenses to allow continued operation of the project pending its ultimate disposition.

sion to "entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 15."⁷

COMMISSION PROCEEDINGS AND OPINION 88

Upon expiration of its original license for its Weber Project, Utah Power & Light Company applied for a new license, and the City of Bountiful, Utah filed a competing application for Utah Power's project. The City of Bountiful then petitioned the Commission for a declaratory order that municipal applicants are entitled to a statutory preference over private original licensees in Section 15 relicensing proceedings. The City of Santa Clara's similar petition was consolidated with Bountiful's petition. By order issued May 3, 1979, the Commission established the scope of the proceeding, granted petitions to intervene by interested parties, and set the matter for briefing.⁸ Following oral argument, the Commission issued Opinion 88 on June 27, 1980, holding that when Congress enacted the FWPA, it intended to provide a municipal preference over private original licensees. Opinion 88 at 58, Pet. App. 74a.

Although the Commission characterized the issue before it as purely "legal" and likened its role to that of a court, its starting point in interpreting the statute was the legislative history—a history which it described, on rehearing, as "occasionally opaque"—rather than the language of the statute. In its analysis of the legislative

⁷ Section 14(b) was added by the Act of Aug. 3, 1968, Pub. L. No. 90-451, 82 Stat. 616-17 (1968).

⁸ Federal Energy Regulatory Commission, Order Granting Interventions and Setting Briefing Schedule (Order) (FERC Docket No. EL78-43) (May 3, 1979), reprinted in Pet. App. 118a.

history, the Commission (Opinion 88 at 47-49, Pet. App. 61a-64a):

(1) acknowledged that the municipal preference provision, as originally introduced in 1918, contained "no words expressly including . . . successor licenses";

(2) contended that the municipal preference nevertheless "clearly applied to the issuance of all successor licenses," albeit "silently";

(3) opined that this silent relicensing preference "became obscured through the successive amendments" to the bill;

(4) found that the municipal preference nevertheless "continued to apply silently to all successor licenses"; and

(5) concluded that "[t]he words [in issuing licenses to new licensees under Section 15 hereof] were added to express the same municipal preference with respect to successor licenses that was in Section 7 silently immediately before its amendment."

When the Commission turned from the legislative history to the statute's language, it interpreted the term "new licensees" to include "original licensees" notwithstanding the contrary meaning of the term in Sections 15 and 22.⁹ The Commission found that "there is no reason to require the term new licensees" to have the same meaning in Section 7 as it has in Sections 15 and 22. The Commission's rationale was that the term "original licensee" as used in Section 8, has a different meaning

⁹ The Commission gave no weight to the express cross-reference from Section 7(a) to Section 15 and never discussed the extensive and consistent use of the term "new licensees" to exclude "original licensees" in Congressional debates. *See infra* at 24.

from its meaning in Sections 15(a) and 22, and thus there was no need to interpret the term “new licensees” consistently.¹⁰ Petitioners invite the Court’s particular attention to the Commission’s analysis of the language of the statute. Opinion 88 at 41-47, Pet. App. 54a-61a.

The Commission attempted to bolster its conclusion that the preference applies against original licensees with a discussion of the “effects” of the two conflicting interpretations advanced by the parties. According to the Commission, petitioners’ interpretation produces “absurd results.”¹¹

The Commission next addressed the fact that in 1967, in recommending legislation relating to relicensing, it advised the jurisdictional committees of Congress that it interpreted the municipal preference to apply solely against new licensees. As the Commission acknowledged, a majority of the Senate Commerce Committee informed

¹⁰ Opinion 88 at 46, Pet. App. 59a-60a. Petitioners contend that the Commission’s analysis of the meaning of the term “original licensee” is wrong. Moreover, even if the Commission’s interpretation of “original licensee” were correct, it does not follow that the Commission’s decision to interpret the term “new licensees” inconsistently is justified. See *infra* at 21-23.

¹¹ The Commission did *not* hold that applying the municipal preference against private original licensees was an absurd result. Rather, the Commission assumed that petitioners’ interpretation might lead to results which the Commission thought to be absurd, *e.g.*, 1) a *municipal* original licensee would receive no preference over private applicants in a relicensing proceeding, and 2) the Commission would be required to undertake a “two-step” proceeding. Opinion 88 at 51-52, Pet. App. 65a-67a. The Commission’s characterization of petitioners’ interpretation and of the results of that interpretation is wrong. Petitioners neither advocate, nor does their interpretation produce, the results which the Commission found to be absurd. See *infra* at 27-29.

Congress of its agreement with the Commission's 1967 conclusion that: 1) the municipal preference does *not* apply against original licensees, and 2) legislation extending the preference to apply against original licensees would not be desirable. But the Commission in Opinion 88 gave no weight either to its own prior interpretation or to the endorsement by the Committee's majority of that interpretation in the Senate Commerce Committee Report.¹²

The Commission subsequently denied petitions for rehearing, admitting its difficulty in supporting the con-

¹² See Opinion 88 at 32-39, 53-55, Pet. App. 45a-52a, 68a-71a. The House and Senate Committees received extensive testimony on the precise issue presented in this case. In a written statement, the Chairman of the Federal Power Commission advised both Committees that the municipal preference in relicensing did not apply against the original licensee, and continued:

In preparing the draft legislation we rejected the suggestion that the statutory preference should be extended so as to apply to a contest for a new license between an original licensee and a party who, in the case of a contest for an unconstructed project, is entitled to preference. Similarly, we rejected the recommendation that a statutory preference should be established in favor of the original licensee.

United States Relicensing or Recapture of Licensed Hydroelectric Projects: Hearings on S. 2445 Before the Senate Commerce Comm., 90th Cong., 2d Sess. 19 (1968); Authority of FPC to License and Take Over Hydroelectric Projects: Hearings on H.R. 12698 and H.R. 12699 Before the Subcomm. on Communications and Power of the House Interstate and Foreign Commerce Comm., 90th Cong., 2d Sess. 23 (1968).

Opinion 88 quotes from the Senate Commerce Committee Report, *inter alia*, the statement that (Opinion 88 at 35, Pet. App. 48a):

"Your committee was impressed by the testimony of the Federal Power Commission concerning its interpretation of the law in this [relicensing] area and the policy it now applies to implement the law."

clusion it reached in the original order (Opinion 88-A, Pet. App. 80a):

As we indicated in Opinion No. 88, nothing in either the intrinsic or the extrinsic evidence on the meaning of Section 7(a) is clearly dispositive of the question before the Commission. The Commission has, in Opinion No. 88, attempted to give full effect to the general purpose of Section 7(a), in the context of Part I of the Federal Power Act, and reflected then on the lengthy and occasionally opaque legislative history.

Several private original licensees filed petitions for judicial review pursuant to Section 313(b) of the Act, 16 U.S.C. § 825l(b)(1976).

ELEVENTH CIRCUIT PROCEEDINGS AND OPINION

The court's seven page opinion framed the controversy as a purely legal one requiring a choice between two conflicting interpretations of the term "new licensees" as used in Section 7(a). The court summarily concluded, without analysis, that both of the conflicting interpretations are "reasonable," that the meaning of "new licensees" is therefore ambiguous, and that it is consequently appropriate to consult the legislative history. 685 F.2d at 1316, Pet. App. 9a. Before the court turned to that legislative history, however, it adopted the Commission's conclusion that petitioners' interpretation, although reasonable, produces absurd results, and held that "the Commission properly relied heavily upon legislative history" to resolve the issue.¹³

¹³ 685 F.2d at 1316-17, Pet. App. 9a-10a. The court's opinion simply adopts the Commission's mischaracterization of petitioners' interpretation.

On reviewing isolated excerpts from the "legislative history" material, however, the court found a less than compelling basis for decision:

Although much of this material is weak, for the purpose of determining legislative intent, it is helpful and apparently all that is available.¹⁴

The court then held that it "must grant great deference" to the Commission's decision to interpret the words "new licensees" as if they included "original licensees" and affirmed Opinion 88. *See* 685 F.2d at 1318, Pet. App. 12a-13a.

A petition for rehearing and a joint suggestion filed on behalf of all investor-owned utility parties for *en banc* consideration were denied without opinion. *See* 693 F.2d 135, Pet. App. 83a.

REASONS FOR GRANTING THE PETITION

I. Whether Section 7(a) Of The Federal Power Act Provides A Municipal Preference Against Original Licensees Is A Substantial Federal Question That Has Not Been, But Should Be, Resolved By This Court.

There are currently at least eight relicensing proceedings before the Commission involving competition between a private original licensee and a municipal

¹⁴ 685 F.2d at 1317-18, Pet. App. 12a. The court thus approved the Commission's heavy reliance upon legislative history which the court deemed "weak, for the purpose of determining legislative intent. . . ." 685 F.2d 1317, Pet. App. 12a. As discussed *infra* at 24-27, the court is simply wrong in its conclusion that the selected handful of excerpts from the legislative history noted in the court's opinion is "apparently all that is available." The court did not even mention, much less address, the extensive legislative history supporting the petitioners' interpretation, including a long history of consistent usage by Members of Congress of the term "new licensees" to exclude original licensees.

applicant.¹⁵ According to the Commission, an additional 154 private licenses will expire between January 1, 1983 and December 31, 1993.¹⁶ The decision below places municipal applicants in an extremely favorable position in each of those eight pending cases and in every future contested case. The privately-owned electric utilities which operated FERC-licensed major hydroelectric projects served some 43 million customers in 1980.¹⁷ The Commission's decision imposes burdens upon, and threatens serious economic loss to, these private utilities and their customers.

A. The Decision To Apply The Municipal Preference Against Original Licensees Has A Significant Adverse Impact Upon The Investor-Owned Electric Utility Industry And Its Customers.

The purpose and importance of the Federal Water Power Act of 1920 is well understood by this Court.¹⁸ The Court noted only last term that:

The potential of water power as a source of electric energy led Congress [in the Federal Water Power

¹⁵ A table containing information on these pending projects is included in Pet. App. at 123a.

¹⁶ Federal Energy Regulatory Commission, DOE/FERC-0011, *Federal Power Commission (Final) 1977 Annual Report* 51-57 (1978).

¹⁷ See *id.*; Energy Information Administration, U.S. Dep't of Energy, DOE/EIA-0044(80), *Statistics of Privately Owned Electric Utilities in the United States 1980* 225-260 (1981); Federal Energy Regulatory Commission, FERC-0070, *Hydroelectric Power Resources of the United States* 70-119, 130-140, 149 (1980) [hereinafter cited as *FERC Hydroelectric Power Report*].

¹⁸ See, e.g., *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395 (1975); *Federal Power Comm'n v. Union Electric Co.*, 381 U.S. 90 (1965); *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955); *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946).

Act] to exercise its constitutional authority over navigable streams to regulate and encourage development of hydroelectric power generation "to meet the needs of an expanding economy." *FPC v. Union Electric Co.*, 381 U.S. 90, 99 (1965).

New England Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982).

Since the FWPA's enactment in 1920, hydroelectric power has emerged as an important element of the domestic energy sector—one which contributes significantly to the economic welfare and security of a nation with a continuing dependence on foreign energy sources. By January, 1980, there were some 490 major hydroelectric generating projects, located in 32 states, under license to non-municipal, non-Federal entities.¹⁹ These projects generated approximately 64.6 billion kilowatt hours of electricity in 1980²⁰—enough electricity to meet the entire annual needs of approximately 7.3 million residences.²¹ The estimated replacement cost of the facilities generating this energy is approximately \$21.7 billion;²² the estimated annual cost of replacing the elec-

¹⁹ *FERC Hydroelectric Power Report* at 70-119. This figure does not include minor hydroelectric projects—i.e., hydroelectric projects with less than 2000 horsepower developed capacity. The Commission has exempted many such projects from Sections 14 and 15, the takeover and relicensing provisions of the Act, pursuant to Section 10(i), 16 U.S.C. § 803(i) (1976).

²⁰ *FERC Hydroelectric Power Report* at 70-119.

²¹ The estimated average annual residential kilowatt hour use for 1981 was 8,772 kilowatt hours. "1982 Annual Statistical Report," *Electrical World* at 89 (March, 1982).

²² The 490 projects have an aggregate developed capacity of approximately 22.8 million kilowatts. *FERC Hydroelectric Power Report* at 70-119, 149. The replacement cost of that capacity, in 1980

tric energy produced by these facilities is more than \$1.0 billion.²³

Because most viable sites for large hydroelectric projects have already been developed, a privately-owned utility that fails to obtain a new license for its project may be forced to replace its project with an expensive new thermal generating plant.²⁴ Moreover, subsequent to the decision below, the Commission staff has taken the position that the original licensee in such a situation is entitled to *no* compensation from a "new licensee" either for the cost of constructing a replacement plant, or for the increased cost of fuel used to operate the new plant.²⁵ The Act provides in Section 15(a) that a "new licensee," upon

dollars, based on a cost of \$950 per kilowatt, is approximately \$21.7 billion. The \$950 per kilowatt figure is based on projected costs for a 1.2 million kilowatt low-sulfur, sub-bituminous coal powerplant. Energy Information Administration, U.S. Dep't of Energy, DOE/EIA-0356/1 Vol. 1, *Projected Costs of Electricity from Nuclear and Coal Fired Power Plants* 26 (1982).

²³ This figure is based on the use of coal to replace the 64.6 billion kilowatt hours of average annual generation from the 490 major projects under license to non-municipal, non-Federal facilities, and is derived from U.S. Dep't of Energy, *Cost and Quality of Fuels for Electric Utility Plants*, Table 23 (July, 1982).

²⁴ Alternatively, the utility may attempt to purchase power to replace lost energy production. However, as a result of various municipal preference provisions for purchase of low-cost Federal power, only relatively expensive replacement power may be available to a privately-owned utility.

²⁵ *Pacific Power & Light Co.*, Initial Brief of Commission Staff (FERC Docket Nos. 935 and 2791) at 86-99 (filed January 14, 1983). In 1968, fuel costs of privately-owned utilities nationwide represented approximately 18 percent of the cost per kilowatt hour; 12 years later, in 1980, 37 percent of the total bills paid by ultimate customers was devoted to fuel expense. Energy Information Admin-

relicensing, shall pay the original licensee the "net" investment plus severance damages.³⁶ But if the payment to the original licensee based on net investment plus severance damages does not include compensation for either: 1) the vast difference between the cost of new capacity and the "net investment" in the existing facility; or 2) the difference between the fuel cost to operate a hydroelectric project—virtually zero—and the cost of fuel to operate the new capacity, then, as the Commission recognized, the compensation the original licensee would receive:

could range from zero, to a substantial part of the cost of construction or acquisition many years ago when price levels were much lower than today, and *would be considerably less than the cost of building or otherwise acquiring new generating capacity today.*

Opinion 88 at 4, Pet. App. 18a (emphasis supplied).

Under Federal and State ratemaking statutes, these extraordinary cost impacts of such a takeover will be included in the investor-owned utilities' cost-of-service, and passed on to the utilities' customers. Thus, those customers who paid for the hydroelectric plants operated

istration, U.S. Dep't of Energy, DOE/EIA 0044(80), *Statistics of Privately Owned Electric Utilities in the United States 1980 23-24* (1981).

³⁶ "Net investment" is a cost-related price, defined at Section 3(13), 16 U.S.C. § 796(13) (1976). Severance damages are not defined but are discussed in Section 14(a), 16 U.S.C. § 807(a) (1976). The right of the Federal government, States and municipalities to acquire licensed projects by eminent domain is expressly reserved by Section 14(a). The price to be paid in the case of eminent domain, however, is "just compensation"—a value-related, rather than a cost-related price. Opinion 88 at 4, Pet. App. 18a.

by private utilities now face both the very real threat of inadequate compensation for the loss of their facilities, and the burden of paying for the construction and operation of any necessary replacement capacity.

Finally, transfer of these hydroelectric projects threatens to produce other serious economic disruption—impacting upon virtually all sectors of the public—such as that foreseen by the Senate Commerce Committee in 1968 when it noted that:

[c]ontinuity of ownership and management is desirable to avoid possible interruption of service resulting from the severance of a project from an integrated system, the upsetting of existing tax patterns which are a substantial source of revenue to many communities, the dislocation of jobs, and other possible adverse results.

S. Rep. No. 1338, 90th Cong., 2d Sess. 3-4 (1968).

B. The Municipal Preference Provides Significant Competitive Advantages To Municipalities.

The municipal preference is a significant factor in every contest in which it applies for three reasons. First, the preference provides municipal applicants a unique statutory right to have their applications compared to private parties' applications for new licenses on the basis of an "equally well adapted" standard, rather than the "best adapted" standard.²⁷ Under the "best adapted"

²⁷ Section 7(a) of the Act, 16 U.S.C. § 800(a) (1976), provides that:

. . . in issuing licenses to new licensees under section 15 hereof the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission *equally well adapted* . . . as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are *best*

standard competing applicants bear the same burden of demonstrating that their plans will *best* serve the public interest, and in selecting one application over another, the Commission must articulate reasons for finding the successful applicant's plans to be superior. Under Opinion 88, on the other hand, a municipal applicant need not demonstrate that its takeover of the project will better serve the public interest than would continued operation by the original private licensee; it need only demonstrate that its plans will serve the public interest equally well. Consequently, the private original licensee, if it is to retain its license, would be required to demonstrate that its proposal to continue operation of the project is *superior* to the municipality's proposal.²⁸ In addition, application of the "equally well adapted" standard rather than the best adapted standard allows the Commission to resolve difficult questions concerning the merits of competing proposals without articulating a finding that one applicant will *best* serve the public interest.²⁹

Second, the preference entitles a municipality to amend an inferior application in order to meet the "equally well adapted" standard. The statute provides a prefer-

adapted to develop, conserve, and utilize in the public interest the water resources of the region. . . .

(Emphasis supplied.)

²⁸ Subsequent to the Eleventh Circuit's decision, the Commission's staff has taken the position that the private original licensee must show that transfer of the project to a competing municipal applicant would produce "substantial," "long-term," adverse impacts on the public interest. *Pacific Power & Light Co.*, Initial Brief of Commission Staff (FERC Docket Nos. 935 and 2791) at 8 (filed January 14, 1983).

²⁹ *Cf.*, *City of Dothan, Alabama v. FERC*, 684 F.2d 159, 165-69 (D.C. Cir. 1982) (Mikva, J., dissenting).

ence for the plans of a municipality initially found to be "equally well adapted" with the proposals of other license applicants, or which "shall within a reasonable time to be fixed by the Commission be made equally well adapted." Section 7(a) of the Act, 16 U.S.C. § 800(a) (1976). The Commission's relicensing regulations, 18 C.F.R. Part 16 (1982), do not spell out the method of implementing this "second-bite." However, the analogous regulations governing permits and initial licenses provide that:

the Commission will inform the municipality or state of the specific reasons why its plans are not as well adapted and afford a reasonable period of time for the municipality or state to render its plans at least as well adapted as the other plans.

18 C.F.R. § 4.33(g)(4) (1982).

Moreover, because the Commission's policy is to accept for filing thoroughly plagiarized competing license applications, the preferred municipal applicant may photocopy or otherwise adopt as its own the superior elements of the original licensee's application in exercising its "second-bite" opportunity.³⁰

Third, the preference acts as a "tie-breaker"—i.e., Section 7(a) requires that in cases of "equally well adapted" plans, the Commission give preference to municipalities. This "tie-breaker" provision mandates that municipal applicants win all "ties."

In sum, the "equally well adapted" test associated with the preference creates the possibility of a "tie" and places

³⁰ *Tuolumne Regional Water District*, Project No. 4309-001, 19 F.E.R.C. (CCH) ¶ 61,132 (May 10, 1982) (providing that the Commission will permit the verbatim duplication of competing proposals and alluding to the possibility of a separate copyright infringement action under the copyright laws).

the burden of proof upon the private applicant; the "second-bite" provision of the statutory preference encourages the finding of a tie in such proceedings; and the "tie-breaker" assures that municipal applicants win all such ties.

II. THE COMMISSION IGNORED THE LANGUAGE OF THE STATUTE, THREE PRINCIPLES OF STATUTORY CONSTRUCTION, AND THE LEGISLATIVE HISTORY OF THE TERM "NEW LICENSEES."

Petitioners contend that the meaning of "new licensees" as that term is used in Section 7(a) excludes "original licensees." This interpretation is based on the consistent usage of the term "new licensees" in Sections 15 and 22 and throughout extensive legislative debates.

To reach its contrary interpretation, the Commission contravened the most basic canons of statutory construction. The Commission held that the term "new licensees" as used in Section 7(a) encompasses both "new licensees" and "original licensees." Opinion 88 at 10-11, Pet. App. 24a-25a. Quite obviously, the Commission could not rely on the language of the Act to reach this result. Rather, the Commission interpreted the term "original licensee" inconsistently within the statute, dismissed an explicit statutory cross-reference, denied meaning to the key phrase in issue, and failed even to mention the clearest evidence of legislative intent which can be gleaned from the years of Congressional debate—the Congress' consistent use of the term "new licensees" to exclude "original licensees."

A. The Starting Point In Statutory Construction Is The Language Itself; The Commission Began With The Legislative History.

The most basic tenet of statutory construction is that the "starting point in . . . the construction of the statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring); see *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976). The Commission began, instead, with the legislative history, reached its conclusion, and then attempted to rationalize its result.

B. The Terms Of A Statute Are To Be Interpreted Consistently Throughout; The Commission Refused To Do So.

It is an equally well-settled principle of statutory interpretation that terms or phrases used in different parts of a statute are to be interpreted consistently, unless there is clear evidence that Congress intended them to be read otherwise. *Atlantic Cleaners and Dyers, Inc. v. United States*, 286 U.S. 427 (1932); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 387 n.5 (1980) (Stewart, J., dissenting).³¹ As the Court noted in *Atlantic Cleaners*, it is a "natural presumption that identical words used in different parts of the same act are intended to have the same meaning." 286 U.S. at 433. Reference to the use of a term in one part of a statute is

³¹ There, Justice Stewart noted:

"Nonforfeitable" is used in Title I [of ERISA] as a term of art. Congress used the same word in critical portions of Title IV. Had it intended "nonforfeitable" to carry one meaning in Title I and another in Title IV Congress would presumably have said so, particularly since the two Titles were considered and enacted in tandem and were meant to function as an interrelated system.

...

446 U.S. at 387 n.5 (emphasis supplied).

often an important tool in discovering its meaning in other places in which it is used. *See United States v. Cooper Corp.*, 312 U.S. 600, 606 (1941). Reference to Section 15 to determine the meaning of "new licensees" as used in Section 7(a) is particularly appropriate, in light of the statutory cross-reference from Section 7(a) to Section 15.

Yet in order to justify its conclusion, the Commission defined the term "new licensees" in Section 7(a) in a way which is fundamentally different from its meaning in Section 15 and in every other place in which it appears in the statute. This result would be difficult enough to justify if the words appeared in unrelated provisions of the Act. It simply cannot be supported in this case where the term "new licensees" appears in Section 7(a) *in the very phrase which refers specifically to Section 15 of the Act.*

The term in issue here, "new licensees," appeared in Sections 7, 15 and 22 in the 1920 Act and subsequently was used in the 1968 amendments in Sections 7(c) and 15(b). There is no dispute that the term "new licensees" intentionally excludes "original licensees" in Sections 7(c), 15(a), 15(b) and 22. Thus the Commission's conclusion, which is supported by no legitimate analysis of the language of the Act, results in an interpretation of the term "new licensees" in Section 7(a) which is aberrational and contrary to its usage in every other place in which it appears in the Act.

In an obvious attempt to find statutory ambiguity where none exists, the Commission concluded that (Opinion 88 at 46, Pet. App. 59a-60a):

The term "original licensee", when used alone in Section 8, does not have the same meaning as the

same term when used in correlation with "new licensee" in Sections 15(a) and 22. And since it doesn't, there is no reason to require the term "new licensees", when used alone in Section 7(a), to have the same meaning as the term "new licensee" when used in correlation with "original licensee" in Sections 15(a) and 22.

The presumption favoring consistent interpretation, the express cross-reference from Section 7(a) to Section 15, and the consistent usage of the term "new licensee" every place it appears in the statute and legislative history all contradict the Commission's conclusion that there is "no reason" to interpret the term "new licensees" consistently.³²

C. Statutory Language Is To Be Construed So As To Give Effect To All Words; The Commission Treated The Phrase "To New Licensees" As Mere Surplusage.

It is a time-honored rule of statutory construction that statutes are to be construed to give effect to every word used and in such a way that no clause or word is left without meaning. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879); 2A Sutherland, *Statutory Construction* § 46.06 (C. Sands 4th ed. 1973).

Section 7(a) as enacted by Congress provides that there is to be a preference in favor of States and municipalities "in issuing licenses to new licensees under section 15. . . ." The Commission's interpretation applies the municipal preference against *all* licensees in proceedings under Section 15, treating the phrase "to new licensees" as though it were not there. That interpretation deserves

³² Moreover, the term "original licensee" has the *same* meaning in Section 8 as it has in Section 15(a) and 22.

careful scrutiny because, as this Court stated in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979):

In construing a statute we are obliged to give effect, if possible, to every word Congress used.

D. Throughout The Legislative History The Term "New Licensees" Was Used Consistently To Exclude "Original Licensees"; The Commission Ignored This History.

The term "new licensee" appears at least 137 times during congressional debates on the Federal Water Power Act in 1919 and 1920.³³ *In each case the term is used to refer to entities other than original licensees.* This repeated consistent usage of the term makes certain that it had a clear meaning and that Congress never used the term to include original licensees.

The Commission ignored this compelling evidence concerning the Congressional intent behind the term "new licensee," preferring to rely upon a wide assortment of admittedly "opaque" general historical materials to construct a result-oriented theory of the Wilson Administration's general desires regarding the municipal preference. See Opinion 88 at 17-31, Pet. App. 30a-44a.

III. THE COURT OF APPEALS FAILED TO TEST THE THOROUGHNESS, VALIDITY AND CONSISTENCY OF THE COMMISSION'S REASONING.

The court of appeals failed to correct the Commission's serious errors of statutory construction. Rather than apply any of the settled canons of statutory construction—which may have been foreign to the Commission but constitute basic tools of the judiciary—the

³³ See 59 Cong. Rec. 245-46 (1919); 59 Cong. Rec. 1042-1048, 1105, 1108, 1433, 1435-37, 1441-43, 1472-73, 1483, 6520, 6522, 6524, 7224-25, 7779 (1920). See, e.g., Pet. App. 125a-135a.

court merely parroted the Commission's *ad hoc* approach in summarily holding that:

Like the Commission, we easily overcome the plain meaning hurdle. The fact that the public companies here have accorded one reasonable interpretation to the words "new licensees" by relying on its [sic] context in section 7(a), and that private interests have accorded a different but reasonable meaning to the phrase by following the reference in section 7(a) to section 15 suggests that the meaning of the term "new licensees" is sufficiently ambiguous to merit resort to legislative history.

685 F.2d at 1316, Pet. App. 9a.

This paragraph is remarkable in several respects. *First*, the court apparently believed that the mere fact that opposing lawyers disagree on the meaning of a statutory term is enough to render the statute ambiguous. *Second*, the court's conclusion, although central to its disposition of the case, is preceded by no analysis. *Third*, the well-established principle that the language of a statute is the best guide to determining congressional intent is treated by the court as a "hurdle" to be "overcome," rather than a legal principle to be applied as a matter of well-established case law. See *CBS, Inc. v. FCC*, 453 U.S. 367, 377 (1981); *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). *Fourth*, The court's language is virtually a direct quotation from the Commission's Opinion.³⁴

³⁴ Opinion 88 at 42, Pet. App. 55a, reads:

Turning first to the words chosen by Congress, the fact that the public power interests have been able to provide one reasonable interpretation to "new licensees" without reference to extrinsic construction aids, chiefly through its context in Section 7(a), and the further fact that the private power interests attribute a

Finally, the circularity of the court's reasoning in the key paragraph deserves special emphasis. The court permits an interpretation derived solely from legislative history—the public power parties' interpretation—to establish the very ambiguity that is said to warrant resort to the legislative history.³⁵

The court's discussion of legislative history is equally devoid of analysis. The court ignored entirely the consistent usage of the term "new licensees" throughout the Congressional debates preceding enactment of the FWPA.³⁶ Instead, it cited a few isolated excerpts relied upon by the Commission and erroneously claimed that those materials "apparently" constituted all existing legislative history. The fact is that the legislative history contains much more material—material more relevant and illuminating than that relied upon by the court. Both the Commission and the court have characterized the general legislative history materials they rely upon as "opaque" and "weak." Indeed, those materials support petitioners' interpretation at least as well as they support the Commission's. More important, the repeated and consistent usage of the term "new licensees" throughout the legislative history—although ignored entirely by the Commission and court of appeals—constitutes clear and compelling evidence supporting only one interpretation,

different meaning by following the reference in Section 7(a) to Section 15 . . . suggest that there is sufficient ambiguity as to the meaning of "new licensees" that it would be appropriate to turn to the legislative history.

³⁵ The court incorrectly suggested that the basis of the public power parties' interpretation is the "context in section 7(a)." As the Commission correctly noted (Opinion 88 at 13, Pet. App. 26a):

The public power interests focus their argument on the legislative history of Section 7(a). . . .

³⁶ See *supra* at 24.

i.e., Congress used the term "new licensees" consistently to *exclude* "original licensees."

The apparent explanation for the court's cursory review of the important Federal question before it is its belief that it was compelled to grant "great deference" to the Commission. 685 F.2d at 1318, Pet. App. 12a. The court *adopted* but *never tested* the Commission's reasoning, and merely substituted deference for a thorough, independent analysis of the reasonableness of the Commission's interpretation. This Court has recently reiterated its admonition from *Skidmore v. Swift & Co.*³⁷ that:

the thoroughness, validity and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling.

Federal Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1982). The Commission's interpretation, which is neither contemporaneous with enactment of the statute, longstanding, consistent with prior administrative interpretation, nor supported by valid reasoning, simply fails by the widest of margins to meet the *Skidmore* test.

Unless this Court grants *certiorari*, the Commission's erroneous interpretation of an extremely important provision of the Federal Power Act will have been adopted without meaningful judicial review.

IV. APPLICATION OF THE MUNICIPAL PREFERENCE SOLELY AGAINST "NEW LICENSEES" PRODUCES A REASONABLE RESULT CONSISTENT WITH THE LANGUAGE AND LEGISLATIVE HISTORY OF THE ACT.

The sole issue in this proceeding is whether the municipal preference applies against an original licensee that is

³⁷ 323 U.S. 134, 140 (1944).

neither a State nor a municipality.³⁸ Petitioners contend that the municipal preference does not so apply. Petitioners' interpretation produces only one result—it precludes application of the municipal preference against private original licensees.³⁹

Neither the Commission nor the court has found this result to be unreasonable. The Commission and the court of appeals, however, attributed other results to petitioners' interpretation which it does not produce, and then found those results absurd. For example, the court of appeals stated that under the petitioners' theory, "the only time a license holder would fail to obtain reissuance of a license would be when the [project] is not profitable." 685 F.2d at 1316, Pet. App. 10a. That is incorrect. It is important to recognize that under the petitioners' theory, the original licensee will in fact "fail to obtain reissuance of a license" for *any* project if it is unable to show that its plan is "best adapted." Conversely, a municipal or other competitor of an original licensee will obtain the new

³⁸ The Commission Order of May 3, 1979, was quite clear in establishing the scope of this proceeding (Order at 2, Pet. App. 119a (emphasis supplied)):

Our inquiry here is *solely*—assuming a particular competing applicant on relicensing is a "municipality," and assuming its plans are or are made equally well adapted as those of a *non-municipal* "original licensee"—whether that municipality has a preference over that non-municipality.

³⁹ The Commission and the court considered the additional question whether a *municipal original* licensee is entitled to a preference against *new private* applicants. That question clearly is *not* within the scope of this case. Petitioners do not contend that a municipal original licensee has no preference and their interpretation does not produce that result. Moreover, it appears from the legislative history that Congress never considered that issue and, to the best of petitioners' knowledge, a contest between a municipal original licensee and a private new licensee has never arisen.

license if it demonstrates that its plan is "best adapted" to develop, conserve, and utilize in the public interest the water resources of the region. Meanwhile, the municipal preference at relicensing has a significant role. If two or more applicants challenge the original licensee in the relicensing proceeding, Section 7(a) will provide a municipal competitor the three-part statutory preference discussed *supra* at 17-20, against all private "new licensees." As a result, the municipal applicant will often prevail over the private new applicants.⁴⁰

Thus, as between the original licensee and a new municipal applicant, the "best adapted" test applies and it is the public interest which receives the sole preference. There is no advantage or preference for either applicant—instead, they are on an equal footing. The applicant whose plans are best adapted to serve the public interest, as determined by the Commission on a case-by-case basis, will be offered the license.

The language of the Act and its legislative history compel the conclusion that this was the policy agreed upon as Congress finally concluded years of debate and approved the Federal Water Power Act.

⁴⁰ This is consistent with the Commission's application of the municipal preference in the case of issuing initial licenses where a preliminary permit has been issued. In such a case, the Commission applies the municipal preference against all private applicants other than the permittee, while it applies a different standard as between the municipal applicant and the permittee. See 18 C.F.R. 4.33(g), (h) (1982).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

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No.

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ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY and
THE MONTANA POWER COMPANY, *Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

**APPENDIX TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH
CIRCUIT**

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United States Court of Appeals,
Eleventh Circuit.

Sept. 17, 1982

No. 80-7641.

ALABAMA POWER COMPANY, Utah Power & Light Company,
Pacific Gas & Electric Company, the Montana Power Com-
pany, Wisconsin Power & Light Company, and Pacific Power
& Light Company, *Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*.

Petitions for Review of an Order of the Federal Energy
Regulatory Commission.

Before RONEY, TJOFLAT and HATCHETT, Circuit
Judges.

HATCHETT, Circuit Judge:

We are faced with a purely legal question regarding the
statutory construction of section 7(a) of the Federal Power Act
(Act), 16 U.S.C.A. § 800(a) (West 1974). We affirm the deci-
sion of the Federal Energy Regulatory Commission.

I. BACKGROUND

The Federal Power Act, 16 U.S.C.A. § 791a et seq. (West
1974), authorizes the Federal Energy Regulatory Commission
(once known as the Federal Power Commission) to license
public and private entities for the purpose of developing water
power projects.¹ Licensees may develop these projects on wa-

¹ A "water power project" includes all facilities needed to harness
the energy of flowing water to produce turbine generated electric
energy.

ters over which the United States has jurisdiction, and may operate the projects for profit. A license is granted for a term of up to fifty years, at the expiration of which the United States may recover the project for its use or issue a new license to the same or a new entity. If the Commission grants a new entity a license, compensation must be paid to the original licensee for its "net investment" plus "severance damages."² This case involves a contest among potential licensees, including the present license holder, for a new license and presents the question of the preference due a municipal applicant.

² The term net investment is defined at 16 U.S.C.A. § 796 (1974) to mean:

(13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission. . . .

The term "severance damages" is explained in 16 U.S.C.A. § 807 as follows:

(a) . . . [B]efore taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the

Section 7(a) of the Act provides in pertinent part: ". . . in issuing new licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, . . ."³ Section 15(a) also states that: ". . . the Commission is authorized to issue a new license to the *original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license

licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Chapter by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee. . . .

³ Section 7(a) of the Federal Power Act, 16 U.S.C. § 800(a) provides:

Sec. 7. [As Amended August 26, 1935 and August 3, 1968.] In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and *in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted*, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans. [41 Stat. 1067; 49 Stat. 842; 16 U.S.C. 800(a)] [Emphasis added.]

under said terms and conditions to a new licensee," (Emphasis added.)⁴

The petitioners are thirty-eight privately owned utility companies licensed by the Commission to operate water projects.⁵ The intervenors are publicly owned utilities that support the Commission's ruling.⁶

The competitors in this case are the City of Bountiful, Utah, a municipality, and Utah Power & Light Company, a private utility. Both entities applied for a license to operate the hydro-

⁴ Section 15 of the Federal Power Act provides:

Sec. 15. [As amended August 3, 1968.] (a) That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof . . . , the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts, as the United States is required to do, in the manner specified in section 14 hereof . . . : *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid. [Emphasis added.]

⁵ The thirty-eight privately owned utility companies have categorized themselves for purposes of this case into three groups: the hydroelectric utility company group; Pacific Gas & Electric Co.; and Utah Power & Light Co., Montana Power Co., and Wisconsin Power & Light Co.

⁶ The publicly owned utilities that have intervened to support the Commission's opinion are: the American Public Power Association; the City of Bountiful, Utah; the City of Santa Clara, California; and the Clark-Cowlitz Joint Operating Agency, Washington.

electric project operated by the private utility (Utah Power & Light) under a license which expired several years ago. The City of Bountiful, during the license contest, asked the Commission for a declaratory ruling clarifying its entitlement to the statutory preference in section 7(a). The Commission consolidated Bountiful's petition with that of another municipality that also sought a declaration of preference and initiated proceedings to resolve the issue.

Since only declaratory relief was requested, the Commission considered, as does this court, the issue to be one of statutory construction. The Commission issued two opinions on this matter. In its opinion and order declaring municipal preference applicable to hydroelectric relicensings, *City of Bountiful, Utah* (Opinion No. 88), No. EL78-43 (F.E.R.C. June 27, 1980), the Commission held:

[T]he preference of Section 7(a) of the [Act] favoring States and municipalities over citizens and corporations is applicable to all relicensing applications in which States or municipalities, and citizens or corporations, request successor licenses for the same water resources.

The Commission found that the preference to states and municipalities only applied where the plans submitted by the states or municipalities were as "equally well adapted" as the plans submitted by citizens or corporations. In essence, the Commission held that the preference given to states and municipalities by section 7(a) of the Federal Power Act always applies regardless of the identity of the parties competing for reissuance of a license. The Commission stated, however, that a state or municipality would gain the benefits of this preference only in a "tie-breaker" situation. The Commission subsequently denied rehearing, *City of Bountiful, Utah* (Opinion 88-A), No. EL78-43 (F.E.R.C. June 27, 1980 [sic]), and petitioners brought this appeal.

II. JURISDICTION

At the outset, we are faced with a jurisdictional question. Although all parties to this proceeding urge us to reach the merits, we cannot do so if we lack the power to act because the issue is not ripe for judicial review. Since the Commission only ruled in a declaratory fashion, we must determine whether this case is ripe for review in the absence of a final ruling on a particular license application. The Commission has not granted a license to any of the parties to this proceeding, and since the rule announced by the Commission only applies in a "tie-breaker" situation, it is arguable that the ruling herein may never concretely affect any of these parties. Courts are reluctant to apply declaratory judgments to administrative determinations "unless these arise in the context of a controversy 'ripe' for judicial resolution." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). In explaining the ripeness doctrine, the Supreme Court stated that its basic rationale was "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies" 387 U.S. at 148, 87 S.Ct. at 1515. The Court also stated that the ripeness doctrine protects administrative agencies "from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." 387 U.S. at 148-49, 87 S.Ct. at 1515-16. The *Abbott* Court endorsed a two-step approach for analyzing ripeness which requires that we "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149, 87 S.Ct. at 1515.

The Supreme Court set forth four important factors to be used in making this evaluation. The four factors are:

- (1) whether the issues presented are purely legal;
- (2) whether the challenged agency action constitutes "final agency action," within the meaning of Section 10 of the Administrative Procedure Act, 5 U.S.C.A. 704 (West 1977);

(3) whether the challenged agency action has or will have a direct and immediate impact upon the petitioners; and

(4) whether resolution of the issues will foster, rather than impede, effective enforcement and administration by the agency.

Pennzoil Co. v. FERC, 645 F.2d 394, 398 (5th Cir. 1981), (quoting *Abbott*, 387 U.S. at 149-54, 87 S.Ct. at 1515-18). A complete recitation of the factors supporting our conclusion is unnecessary. After full consideration, we find that the issue presented is purely legal, that the challenged agency action will have a direct and immediate impact upon the petitioners, the states, and all potential applicants, as well as the workload of the Commission. We further conclude that resolution of this issue now will foster effective enforcement and administration by the agency. The issue is ripe for judicial review. Having resolved this jurisdictional issue, we turn to the merits.

III. MUNICIPAL PREFERENCES: "NEW" v. "ORIGINAL" LICENSES

Petitioners contend that when Congress provided in section 7(a) of the Federal Power Act, 16 U.S.C.A. § 800(a) (West 1974), that the Commission give a relicensing preference to states and municipalities "in issuing licenses to new licensees under section 15 hereof," it intended the preference to be given to "new licensees" as defined in section 15, 16 U.S.C.A. § 808 (West 1974). They further posit that section 15 distinguishes the term "new licensee" from the phrase "original licensee." Because Congress clearly differentiated between the two terms, petitioners argue that it could not have intended the words "new licensee" to include the holder of the expired license. Thus, petitioners assert that the relicensing preference in section 7(a) is inapplicable to original licensees, but applies only to applicants seeking to acquire the project for the first time. The petitioners contend that the Commission clearly erred in interpreting section 7(a) because it necessarily concluded that Congress meant "any" when it said "new" in the Act.

We must determine whether in issuing licenses to new licensees under section 15 of the Act the Commission must apply a preference in favor of municipalities and states against all competing applicants or whether the preference applies only when the competing applicants are persons or entities other than the original licensee.

Section 7(a) provides a preference for states and municipalities in three situations:

- (1) In issuing preliminary permits;
- (2) in issuing licenses where no permit has been issued; and
- (3) in issuing licenses to new licensees under section 15.

We are concerned only with the third situation. The petitioners urge that we apply the plain meaning of the words "new licensees," as defined in the statute. They contend that the Commission erred in relying on the legislative history of the term "new licensees" cautioning that legislative history is relevant only if the term has no plain meaning. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978).

We agree with petitioners that statutory interpretation must begin with the language of the statute which must be interpreted in accordance with its "plain meaning." *Fitzpatrick v. IRS*, 665 F.2d 327 (11th Cir. 1982); *United States v. Anderez*, 661 F.2d 404 (11th Cir. 1981). We should depart from the official text of the statute and seek extrinsic aid for ascertaining its meaning only if the language is unclear or if apparent clarity leads to absurd results when applied. *American Trucking Associations, Inc. v. ICC*, 669 F.2d 957 (5th Cir. 1982). On the other hand, a reviewing court generally should adhere to the construction of a statute made by the agency charged with its execution unless there are compelling reasons indicating such construction is wrong. *Florida Power & Light Co. v. FERC*, 660 F.2d 668 (5th Cir. 1981). In *United States v. American Trucking Association, Inc.*, 310 U.S. 534,

60 S.Ct. 1059, 84 L.Ed. 1345 (1940), the Supreme Court emphasized that where the plain meaning leads to results that are absurd or at variance with the policy of the enactment, a reviewing court may seek guidance wherever available. The Court stated:

When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."

310 U.S. at 543-44, 60 S.Ct. at 1063-64 (footnotes omitted).

Like the Commission, we easily overcome the plain meaning hurdle. The fact that the public companies here have accorded one reasonable interpretation to the words "new licensees" by relying on its context in section 7(a), and that private interests have accorded a different but reasonable meaning to the phrase by following the reference in section 7(a) to section 15 suggests that the meaning of the term "new licensees" is sufficiently ambiguous to merit resort to legislative history.

The Commission must act in each of the three licensing situations outlined above. As to all three, the Act clearly gives two different preferences. First, the Act gives a preference to states and municipalities when their plans are "as equally well adapted" as those of a private applicant. Second, the Act gives a preference as between applicants other than states and municipalities for plans best "adapted to develop, conserve, and utilize in the public interest the water resources of the region." These preferences cover all situations concerning competing applications. To follow the petitioners' theory of a "limited preference" in favor of municipalities and states against new applicants only when incumbent licensees are not competing changes the statute's entire preference structure. Instead of the two preferences outlined above applying to all cases, the preferences would operate only in some cases. We are not convinced that Congress intended such a result, which would cause administration of the Act by the Commission to be confusing and sporadic. Likewise, the adoption of a "limited preference" advantages incumbent licensees and thus leads to an

absurd result. Under this theory, the only time a license holder would fail to obtain reissuance of a license would be when the water project was not profitable. Thus, states and municipalities realistically would have no preference at all because a preference to a losing project is worthless. Petitioners' position would lead to even more absurd results where the state or municipality was the license holder. By reapplying for the license, the state or municipality would lose its preference.

In finding that the state and municipal preference applies to all cases, the Commission properly relied heavily upon legislative history because the plain meaning advanced by petitioners leads to absurd results. The evidence on which the Commission relied included:

(1) A memorandum which was used in preparation of the Act, written on October 31, 1917 by Mr. O. C. Merrill, conceded by all parties to be an authority;⁷

⁷ Among the materials relied on by the Commission was a memorandum written on October 31, 1917, by O. C. Merrill, which explained the objectives of the municipal preference. The memo, in pertinent part, provided:

Licenses should terminate at the end of the fifty-year period in order that the United States may at that time dispose of the privileges as the public interest and the law and regulations then existing may require. *In such disposition the order of preference should be as follows: (1) the United States—to acquire properties and operate them for Governmental purposes, (2) the State or municipality—to acquire the properties and operate them for municipal purposes, (3) the original licensee—to secure renewal of the license under conditions prescribed by then existing law and regulations, (4) any other applicant—under similar conditions. These provisions will leave the way open for future public ownership and operation if the experience of the next fifty years shall have established the wisdom of such a policy.*

(2) testimony of witnesses for power companies before congressional committees;⁸

(3) the fact that the House-Senate Conference Committee rejected a bill proposed by the Senate, which contained a different preference from that under examination, and the fact that the conference committee accepted the House bill which provided the present preference;

⁸The Commission also relied upon testimony before the House Special Committee where a witness for private industry supporting the bill stated: (Hall is the witness.)

MR. CANDLER. Now then you do understand that under this bill the Government of course has the first right to retake the property?

MR. HALL. Yes, sir.

MR. CANDLER. Then do you further understand it that a provision of the bill further is that some of the licensees might be preferred over the first licensee?

MR. HALL. The bill provides that; yes, sir. They can take it away and give it to somebody else.

MR. CANDLER. *Then the original licensee would have only the third opportunity to count on his lease.*

MR. HALL. *That is the way I understand it. . . .* [Emphasis added.]

The Commission also relied on a conversation between a member of the House Committee and the Secretary of the Interior at Special Committee Hearings. That colloquy was:

Mr. Hamilton. Mr. Secretary, I understood you to say that as between the original licensee and another, assuming there is a licensee who is a bidder at the end of 50 years, as between him and the other bidder, you would give the preference to the original licensee?

Secretary Lane. At the same figure.

Mr. Hamilton. Would you give that preference to the original licensee, assuming that the other bidder was a municipality?

Secretary Lane. I do not think I would.

(4) correspondence between persons interested in the bill such as Gifford Pinchot, President of the National Conservation Association, and writings of O. C. Merrill.⁹

Although much of this material is weak, for the purpose of determining legislative intent, it is helpful and apparently all that is available.

We have reviewed the Commission's interpretation of this statute and deem such construction consistent with the statute's language, structure, scheme, and available legislative history. We must give great deference to the Commission's statutory interpretation. The Supreme Court has announced

⁹The Commission also relied upon a letter of Gifford Pinchot, President of the National Conservation Association, to the Chairman of the Committee on Commerce, which stated, in part:

The obvious intention of Sec. 7, is to give preference to States and municipalities; and you will not be accomplishing this purpose surely, unless you insert after the word "issued" in line 11, page 12, of your bill, the words "and in issuing licenses to new licensees under Sec. 15 hereof," or words of like import.

Letter from Gifford Pinchot to Senator Jones (June 25, 1919), reprinted in *City of Bountiful, Utah*, slip op. at 28.

Section 7 of the bill was then changed to include the Pinchot language.

In the development of water power by agencies other than the United States, the bill gives preference to States and municipalities over any other applicant, both in the case of new developments and in the case of acquiring properties of another licensee at the end of a license period.

The Commission also relied upon the writings of O. C. Merrill, who shortly before the President signed the bill, explained the preference section as follows:

For development by agencies other than the United States preference is given to States and municipalities. A similar preference is given for the acquisition of the properties of other licensees at the end of a license period.

Memorandum from O. C. Merrill to President Wilson (June 8 or 9, 1920), reprinted in *City of Bountiful, Utah*, slip op. at 31.

the rule that " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ' " *CBS, Inc. v. FCC*, 453 U.S. 367, 382, 101 S.Ct. 2813, 2823, 69 L.Ed.2d 706, 720 (1981). The Fifth Circuit has also applied this principle in reviewing FERC decisions. *Falcon Petroleum v. FERC*, 642 F.2d 780, 783 n.3 (5th Cir. 1981). We are aware of petitioner's assertion that the Commission has inconsistently interpreted section 7(a), but dismiss this argument as insubstantial and speculative. The statutory interpretation urged by petitioners is outweighed by Commission interpretations, even if inconsistent, not based upon activities contemporaneous with passage of the statute.

CONCLUSION

We hold that the state and municipal preference in section 7(a) of the Federal Power Act applies in all competitive relicensing cases, not just those where the original licensee is not an applicant. We further hold that the preference applies in a tie-breaker situation.

Accordingly, the order of the Commission is affirmed.

AFFIRMED.

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

OPINION NO. 88

City of Bountiful, Utah)
Utah Power and Light Company) **Docket No. EL78-43**
City of Santa Clara, California)
Pacific Gas and Electric Company)

**OPINION AND ORDER DECLARING
MUNICIPAL PREFERENCE APPLICABLE
TO HYDRO-ELECTRIC RELICENSINGS**

Issued: June 27, 1980

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

MUNICIPAL PREFERENCE

Before Commissioners: Charles B. Curtis, Chairman;
Georgiana Sheldon,
Matthew Holden, Jr.,
and George R. Hall.

City of Bountiful, Utah)	
Utah Power and Light Company)	Docket No. EL78-43
City of Santa Clara, California)	
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INTRODUCTION

On June 10, 1920, President Wilson signed the Federal Water Power Act (FWPA), terminating a controversy between private power interests and conservationists that was equal in many respects to the recent and current controversies involving our nation's other energy resources. That Act created the Federal Power Commission and authorized it, among other matters, to issue licenses not exceeding 50 years for the development of our nation's water power resources. The first paragraph of Section 7 of the FWPA directed the Commission¹ to give preference to applications of "States"² and "Municipalities"³ in certain situations. Although President Wilson's signature terminated the one controversy, at least for the time being, it initiated the principal controversy in this proceeding—whether that State and municipal preference applies in a relicensing proceeding against a licensee that has

¹ The term "Commission" refers to the Federal Power Commission in contexts prior to October 1, 1977, and to the Federal Energy Regulatory Commission in contexts on and after that date.

² The term "State" was defined in Section 3 of the FWPA and is defined in Section 3(6) of the Federal Power Act to mean "a State admitted to the Union, the District of Columbia, and any organized Territory of the United States".

³ The term "Municipality" was defined in Section 3 of the FWPA and the term "municipality" is defined in Section 3(7) of the Federal Power Act to mean "a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power".

applied for a successor license and is not itself a State or municipality.⁴

The significance of that controversy is essentially one of the cost to States and municipalities of acquiring generating capacity, and the correlative cost to citizens and corporations of losing generating capacity. The proviso of Section 14(a) of the Federal Power Act (FPA), which was also embodied in Section 14 of the FWPA, states,

That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation

⁴Section 4(e) of the Federal Power Act, which was Section 4(d) of the FWPA, authorizes the Commission to issue licenses to "citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality. . . ." The term "Corporation" was defined in Section 3 of the FWPA to mean

a corporation organized under the laws of any State or of the United States empowered to develop, transmit, distribute, sell, lease, or utilize power in addition to such other powers as it may possess, and authorized to transact in the State or States in which its project is located all business necessary to effect the purposes of a license under this Act. It shall not include "municipalities" as hereinafter defined.

That term was modified in 1935 to include other forms of business organization and, therefore, the term "corporation" is defined in Section 3(3) of the Federal Power Act to mean

any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined . . .

In the context of Section 4(e) which authorizes the Commission to issue licenses to (1) citizens (including throughout this Opinion and order associations of citizens), (2) domestic corporations, (3) States and (4) municipalities, the issue is whether the State and municipal preference applies in a relicensing proceeding against a citizen or corporation licensee-applicant.

proceedings upon payment of just compensation is hereby expressly reserved.

Accordingly, States and municipalities can acquire licensed projects for public purposes pursuant to their right of eminent domain whenever they are willing to pay the *value-related* price which is constitutionally known as "just compensation". But, to the extent that States and municipalities have a right upon relicensing to acquire projects that were previously licensed to citizens and corporations, they would be able to acquire licensed projects at those times whenever they are willing to pay the *cost-related* price which is embodied in the "net investment" concept of the FPA. That concept refers essentially to the cost of the project, reduced by the recovery of that cost through earnings (principally in the form of accumulated depreciation) in excess of a fair return, during the term of the previous license. That price could range from zero, to a substantial part of the cost of construction or acquisition many years ago when price levels were much lower than today, and would be considerably less than the cost of building or otherwise acquiring new generating capacity today.

The first paragraph of Section 7 of the FWPA was reenacted in 1935 with one substantive change⁵ as Section 7(a) of the FPA.⁶ For convenience, and since there is no material substantive difference between the two provisions, the present

⁵The "equally well adapted" and "best adapted" standards were modified to eliminate the words "navigation and" preceeding "water resources of the region". The modifications are not material to this proceeding because, as discussed *infra*, no factual issues pertaining to specific projects are to be resolved.

⁶Section 7(a) of the FPA as so enacted reads,

In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the

designation, "Section 7(a)", is sometimes used herein to refer to the first paragraph of Section 7 of the FWPA in contexts prior to August 26, 1935, as well as to Section 7(a) of the FPA in contexts on and after that date.

Since the vast majority of initial licenses under the two Acts were issued for the maximum term of 50 years, the Commission has had only one occasion to consider the applicability of the municipal preference⁷ in a contested proceeding in which an investor owned utility, or private power interest⁸, had applied for a successor license. In that case, Carolina Power & Light Company (Carolina Power), the licensee of the Walters Hydroelectric Development, Project No. 432, applied on August 7, 1973, for a new license for that project; and North Carolina Electric Membership Corporation (NCEMC) applied a year later on August 20, 1974, for an essentially identical license for the same project.⁹ An administrative law judge decided, first,

region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

⁷ The term "municipal preference" will refer to the first preference of Section 7(a) to applications of States and municipalities, and should be distinguished from the second or "best adapted" preference of Section 7(a), "between other applicants".

⁸ State and municipal units for developing electric power are sometimes called "public power" in a collective context, and investor owned utilities are sometimes called "private power" in contradistinction. Accordingly, this controversy over the applicability of the municipal preference in relicensing situations is said to be one between public and private power interests. Cooperatives are part of "private power" in this context because they are not included within the definitions of "State" and "municipality".

⁹ NCEMC's application was designated Project No. 2748, which was simply the assignment of a docket number. The new number did not signify a different "project", or unit of improvement or development, within the meaning of Section 3(11) of the FPA.

that NCEMC was not a "State" or "municipality" and could not therefore qualify for the municipal preference, and second, that the municipal preference is restricted "to situations where the original licensee does not seek renewal". In Opinion No. 757, issued March 22, 1976, the Commission affirmed his ruling that NCEMC could not qualify for the municipal preference and said that in view of that decision it would not be appropriate to address the applicability of the municipal preference at this time:

This issue should be addressed in a proceeding where there are parties who will be affected by the application of the preference issue.¹⁰

At the time of the Commission's decision, the City of Bountiful, Utah (Bountiful), a municipality, and Utah Power and Light Company (UP&L), a corporation, had pending applications under Section 15(a) of the FPA for a new license for UP&L's Weber River Project (UP&L's Project No. 1744 and

¹⁰ The Commission has applied Section 7(a) in one other relicensing decision. Escondido Mutual Water Company, a not-for-profit corporation controlled by the City of Escondido, California, applied on April 1, 1971, for a new license for Project No. 176, which application was adopted by the City of Escondido as its own on November 25, 1975. Although five Bands of Mission Indians claimed that they were entitled to the municipal preference, the Commission found (Opinion No. 36, issued February 26, 1979, mimeo, at 74, n. 105) that they were not "municipalities" and, consequently, it did not reach the preference issue (mimeo, at 81 and 206). The Commission declined to issue a power or non-power license to the five Bands, and issued a new license to Escondido Mutual Water Company (a corporation), the City of Escondido (a municipality) and Vista Irrigation District (another municipality), as joint licensees, without otherwise reaching the preference issue. The Commission said (mimeo, at 81),

Our decision is premised upon the superiority under Sections 10(a) and 7(a) of the joint Mutual/Escondido application. Assuming *arguendo* (contrary to our judgment) that the Bands' proposal is best adapted to develop, conserve, and utilize in the public interest the water resources of the region, our decision is also premised upon serious reservations as to the ability of the Bands to carry out their plans under a license or following takeover.

Bountiful's Project No. 2747). Similarly, the City of Santa Clara, California (Santa Clara), another municipality, and Pacific Gas and Electric Company (PG&E), another corporation, had pending applications for a new license for PG&E's Mokelumne River Project (PG&E's Project No. 137 and Santa Clara's Project No. 2745). On July 21, 1978, more than two years after the Commission's decision on Carolina Power's Walters Hydroelectric Development, Bountiful filed a petition requesting the Commission to issue a declaratory order that it is entitled by Section 7(a) to a preference against UP&L when the Commission issues a new license for the Weber River Project. And on August 15, 1978, Santa Clara similarly filed a petition for a declaratory order that it is entitled to such a preference against PG&E when the Commission issues a new license for the Mokelumne River Project. The Commission, on September 27, 1978, issued notice of the filing of the two petitions and their consolidation under Docket No. EL78-43.

Petitions to intervene in support of Bountiful (I)(R) and Santa Clara (I)(R) were filed by The American Public Power Association (I)(R)¹¹, Clark-Cowlitz Joint Operating Agency (I)(R)¹², Northern California Power Agency¹³ and the City of Shawano, Wisconsin. In addition, petitions to intervene in support of UP&L (I) and PG&E (I)(R) were filed by PP&L, Carolina Power (I)(R), The Montana Power Company (I)(R),

¹¹ The American Public Power Association (APPA) is a national service organization of more than 1,400 consumer-owned utilities, including municipalities, State power authorities and districts, cooperatives and others.

¹² The Clark-Cowlitz Joint Operating Agency (JOA) is a municipality that was established in 1976 to compete for Pacific Power & Light Company's (PP&L's) Merwin Project (PP&L's Project No. 935 and JOA's Project No. 2791).

¹³ Northern California Power Agency is a joint action entity consisting of the municipalities of Alamenda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara, and Ukiah, California.

Wisconsin Power and Light Company (I), Georgia Power Company, Niagara Mohawk Power Corporation, the International Brotherhood of Electrical Workers (IBEW) and the Hydro-electric Utility Company Group (I)(R).¹⁴ A notice of intervention was also filed by The People of the State of California and the Public Utilities Commission of the State of California. All of the foregoing subsequently were permitted to participate in the proceeding. On May 3, 1979, the Commission

¹⁴ The Hydro-electric Utility Company Group (Hydro Group) is an *ad hoc* group of the following 34 electric utility companies associated for the purpose of this proceeding:

Virginia Electric & Power Company
 Alabama Power Company
 Minnesota Power & Light Company
 Southern California Edison Company
 Public Service Electric & Gas Company
 Appalachian Power Company
 Pennsylvania Power & Light Company
 Baltimore Gas & Electric Company
 Washington Water Power Company
 Jersey Central Power & Light Company
 Pennsylvania Electric Company
 York Haven Power Company
 Carolina Power & Light Company
 New England Power Company
 Georgia Power Company
 Duke Power Company
 Niagara Mohawk Power Corporation
 Northern States Power Company
 Union Electric Company
 Central Maine Power Company
 Idaho Power Company
 Wisconsin Electric Power Company
 New York State Electric and Gas Corporation
 Louisville Gas & Electric Company
 Connecticut Light & Power Company
 Hartford Electric Company
 Western Massachusetts Electric Company
 Holyoke Water Power Company

fixed a briefing schedule and the participants designated by "I)" and "R)", together with the Commission staff counsel, filed initial and reply briefs, respectively. In addition, the IBEW submitted a statement.

In our order of May 3, 1979, we indicated that our inquiry in this proceeding into the Section 7(a) municipal preference would be limited to two purely legal issues of statutory construction, as follows:

- (1) Does the preference provided in section 7(a) of the Act for a state or a municipality apply in a relicensing proceeding under section 15 of the Act against an original licensee that is neither a state nor a municipality?
- (2) Is a licensee which holds the original license for a project as an assignee or a successor under section 8 of the Act an "original licensee" within the meaning of section 15 of the Act?

We indicated, additionally, that we would *not* decide any factual issues under Section 7(a) pertaining to specific projects, such as whether a particular applicant's plans are (or within a reasonable time are made) as well adapted as another's plans to "conserve and utilize in the public interest the water resources of the region", and in particular that we would not decide whether Bountiful or Santa Clara is entitled to the municipal preference, if it is applicable. We said that their entitlement should be resolved in the separate relicensing proceedings in which they are parties. In view of the importance and complexity of the issues, we scheduled them for oral argument on February 22, 1980.

South Carolina Electric & Gas Company
 Arkansas Power & Light Company
 Public Service Company of Indiana
 Puget Sound Power & Light Company
 Portland General Electric Company
 Pacific Power & Light Company

Within the framework of this proceeding established by our order of May 3, 1979, we view our present role as being the same as that of the District of Columbia Circuit in *Chemehuevi Tribe of Indians v. Federal Power Commission*, *infra*. In other words, the principal question to be decided is not the policy issue of whether it is factually or politically wise for States and municipalities to have a relicensing preference against citizen and corporation licensee-applicants, but the legal issue of whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920.

Having considered the briefs and the oral argument of February 22, 1980, we have concluded and declare, for the reasons discussed herein, that the preference of Section 7(a) of the FPA favoring States and municipalities over citizens and corporations is applicable to all relicensing applications in which States or municipalities, and citizens or corporations, request successor licenses for the same water resources. We have also concluded and declare that States and municipalities are entitled to a preference only when the Commission determines, in the exercise of its judgment, that their plans, and any competing plans of citizens or corporations for the same water resources, are equally well adapted to conserve and utilize in the public interest the water resources of the region.

THE "NEW LICENSEES" CONTROVERSY

The controversy in this proceeding focuses on the meaning of the words "new licensees" in the phrase "in issuing licenses to new licensees under section 15 hereof". The public power interests and the Commission staff counsel contend that a *new license* is one that follows or succeeds an *original* license (or follows or succeeds an interim annual license) and, therefore, that a *new licensee* plainly is *any licensee* under a new license. In other words, the *new licensee* might be the licensee under the original or annual license, or any citizen, corporation, State or municipality that was a stranger to the original license and is eligible under Section 4 to become a licensee. Under their interpretation, in issuing new licenses under Section 15 to *any*

applicant for a license, the Commission is directed by Section 7(a) to give preference to States and municipalities, subject to a finding of equally well adapted plans.¹⁵

The private power interests do not dispute the contention that a *new license* is one that follows or succeeds an *original license* (or follows or succeeds an interim annual license). But they contend that Section 15(a) carefully distinguishes between new licenses that are issued to "original licensees" and new licenses that are issued to "new licensees"¹⁶ and, there-

¹⁵ Santa Clara reads Section 7(a) as though it states,

. . . in ~~issuing~~ determining whether to issue licenses to new licensees under section 15 hereof. . . .

As discussed *infra*, under APPLICABILITY OF SECTION 7(a) TO RELICENSINGS - Plain Meaning, the words "original" and "new" were used in Section 15 of the FWPA and are used in Section 15(a) of the FPA as correlative terms to describe a predecessor/successor relationship in a context of successive license terms. In that context, a "new" license or licensee is a *successor* license or licensee, and an "original" license or licensee is a *predecessor* license or licensee.

¹⁶ Section 15 of the FWPA was redesignated without change in 1968 as Section 15(a) of the FPA. It states:

That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the Commission is authorized to issue a *new license to the original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a *new license* under said terms and conditions to a *new licensee*, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts, as the United States is required to do, in the manner specified in Section 14 hereof: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the Commission shall issue from year to year an annual license to the then

fore, that a *new licensee* as used in Section 7(a) plainly is *any licensee except an original or predecessor licensee*.¹⁷ Under their interpretation, the Commission does not get to the threshold of issuing new licenses under Section 15 to *new licensees* unless the original licensee chooses not to file an application for a new license, or unless the Commission first decides not to issue a new license to the original licensee. They say that in issuing new licenses under Section 15 to *any licensee except an original licensee* the Commission is directed by Section 7(a) to give preference to applications of States and municipalities and, conversely, that the municipal preference does not apply against an original licensee.

The public power interests focus their argument on the legislative history of Section 7(a), claiming that the drafters intended to include a broad municipal preference on relicensing, that the preference was included without question in the initial legislative bill, that the subsequent modifications were for clarification rather than change of concept and, consequently, that a broad municipal preference on relicensing remained

licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid. [Emphasis added.]

It should be noted that the proviso refers incorrectly to the "United States" (rather than the Commission) issuing a license, and refers not consistently to the issuance of a "license to a new licensee" or a "*new license to the original licensee*" (emphasis added). The Third Circuit said, in this connection, in *Metropolitan Edison Company v. Federal Power Commission*, 169 F.2d 719 (Third Cir., 1948), at 723,

To put it bluntly, there are hiatuses and inconsistencies in the Federal Power Act and, as was stated by Judge Learned Hand in *Niagara Falls Power Co. v. Federal Power Commission*, 2 Cir. 137 F.2d 787, 795, * * * it is necessary * * * to break through the band of verbal logic at its weakest spot."

¹⁷ They remind us that licensing under the FWPA and the FPA grew from a leasing concept, and that when a tenant enters into a *new lease* he remains the *original* tenant and does not become a *new* tenant. In other words, his status as a tenant doesn't change, and a *new* tenant would be anyone else. (But see note 44, *infra*.)

in the final bill enacted by Congress and signed by President Wilson. The private power interests, on the other hand, stress the *plain meaning* of "new licensees" derived from Section 15(a) and other provisions, claiming that it is not necessary to resort to the legislative history. They also stress a favorable 1968 interpretation of the General Counsel of the Commission that was transmitted through Chairman White to Congress, claiming that Congress approved that interpretation at that time.

LEGISLATIVE HISTORY OF THE FEDERAL WATER POWER ACT

Jerome G. Kerwin's *Federal Water-Power Legislation* (Columbia University Press, 1926) discusses the economic and legal aspects of water power and is perhaps the most widely recognized authoritative text discussing the legislative history of the FWPA. See, for example, *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90 (1965), and *Chemehuevi Tribe of Indians v. Federal Power Commission*, *infra*. A considerably shorter and less detailed history was written by Gifford Pinchot and published in the *George Washington Law Review* in 1945.

The events leading to the FWPA can be separated into two periods. The first period ended in 1917 after the hearings and debates on the early water power bills, and can be characterized as the formative period. The second period, which can be characterized as the legislative period, began in 1917 with the formalization of the final concept of the FWPA, and covers its movement through Congress.

The Formative Period (1890-1917)

According to Kerwin, the first hydro-electric plant was constructed in 1890 and, thereafter, the development of hydro-electric power proceeded at a rapid pace. But it did not proceed fast enough to suit the private power interests. They encountered problems with legislation enacted under the commerce power to keep open the lanes of navigation. And they

encountered opposition from an anti-monopoly conservation movement with respect to their use of the extensive government lands in the western States.

The Rivers and Harbors Act of 1890 prohibited the creation and maintenance of unauthorized obstructions to the navigable capacity of waters within the jurisdiction of the United States. An extension of that Act in 1899 prohibited the construction of dams in navigable waters of the United States without the consent of Congress and the approval of plans by the Chief of Engineers and the Secretary of War.

Prior to 1896, water power sites on government lands were practically given away as homesteads or by sale. According to Kerwin, they passed from government to private ownership as rapidly as the private power interests could "grab" them. In 1896 the Secretary of the Interior was authorized to issue permits to use rights-of-way not exceeding 40 acres for the purpose of generating, manufacturing or distributing electric power. That authority was broadened in 1901 and 1911; but since the permits were revocable at will and were required to be issued under general regulations that did not permit special arrangements, the private power interests were not satisfied.

In 1898 Pinchot became Chief of the Division of Forestry of the Department of the Interior. He states that Federal water power policy began in 1905 when the responsibility for national forests was transferred to the Department of Agriculture, and the new Forest Service, which he headed, chose to develop its own policy. He wrote in 1945, 14 *George Washington Law Review*, at 12,

There was no question which course to adopt. We must make our own policy and *above all keep the title to the power sites in the public hands.* [Emphasis added.]

Pinchot's policy of keeping the title to power sites in the public hands at some level of government is embodied in the recapture and municipal preference provisions of the FWPA and the FPA. His views that private power interestss were "water power grabbers" who were "eager for plunder" are discussed

in *Chemehuevi Tribe of Indians v. Federal Power Commission* (D.C. Cir., 1973), 489 F.2d 1207, at 1218, n. 54.

In 1908 a bill was passed and presented to President Roosevelt to extend the time for constructing a power dam on the Rainy River (a Canadian boundary stream). President Roosevelt vetoed the bill and proclaimed, in a landmark veto message,

Every permit to construct a dam on a navigable stream should specifically recognize the right of the Government to fix a term for its duration and to impose such charge or charges as may be deemed necessary to protect the present and future interests of the United States

* * *

In place of the present haphazard policy of permanently alienating valuable public property we should substitute a definite policy along the following lines:

* * *

Fifth. Provision should be made for the termination of the grant or privilege at a definite time, leaving to future generations the power or authority to renew or extend the concession in accordance with the conditions which may prevail at the *time*.

The following year President Roosevelt vetoed the James River bill, repeating the substance of his landmark message. According to Kerwin, the conservationist water power policy promulgated in President Roosevelt's two veto messages resulted from the influence of Chief Forester Gifford Pinchot and one Henry Graves. In 1910 President Taft dismissed Pinchot for insubordination after Pinchot publicly criticized Secretary of the Interior Ballinger.

In the meanwhile, the General Dam Act of 1906 fixed the conditions upon which Congress would consent, by special legislation, to the construction of dams in navigable waters of the United States. The General Dam Act of 1910 replaced its 1906 counterpart and provided for 50-year permits that were revocable for cause and subject to takeover by the United

States on payment of reasonable value. But there was no provision for disposition of the properties at the end of the term, and only 8 of the 29 dams authorized under the two Acts were completed.

In June 1914 the Adamson bill pertaining to water power on navigable streams was introduced in the House and assigned to the Committee on Interstate and Foreign Commerce. After hearings, that bill was reported out of the committee and, following a House debate, was amended into a conservation measure and adopted. In May 1914 the Ferris bill pertaining to water power on government lands was introduced in the House and assigned to the Committee on Public Lands. After hearings, that bill was reported out of the committee, adopted by the House and sent to the Senate. After further hearings, the Senate Committee on Public Lands struck everything but the enacting clause and substituted the Myers bill favorable to private power interests. With respect to water power on navigable streams, the Senate stood behind the Shields bill, which was introduced in December 1915 and was also favorable to private power interests. The principal divisive issues pertained to charges for power privileges and recapture. President Wilson tried and failed to cause water power legislation to be enacted prior to the entry of the United States into World War I.

The most important thing to understand about the formative period is that it ended with a general understanding that if the nation's water power resources were to be preserved for the public, it would be necessary to place a time limit on a private lessee's or licensee's use of the resources, and enact nothing which would, in effect, give a right of perpetual use to a private lessee or licensee.

The Legislative Period (1917-1920)

The hearings and debates on the early water power bills provided forums in which the competing interests sharpened and resolved issues. One seemingly insoluble problem, however, was the superabundance of committees with jurisdiction

over some face of water power legislation—Public Lands, Indian Affairs, Agriculture, Military Affairs, Interstate and Foreign Commerce, Foreign Affairs and Rivers and Harbors.

In 1917 the Secretaries of Agriculture, the Interior and War caused an interdepartmental committee to be formed to draft a water power bill treating both navigable waters and government lands; and Oscar Charles Merrill, Chief Engineer of the Forest Service since 1905, was designated as the committee member from the Department of Agriculture.¹⁸ That committee drafted a bill that was presented to President Wilson and approved by him and the three Secretaries just before the Christmas holidays in 1917. Just after those holidays the President presented the so-called Three Secretaries Bill, or Administration Bill, to certain House committee chairmen and requested the formation of a special Committee on Water Power to get that bill through Congress. The committee was authorized and, on January 15, 1918, the bill was introduced by Congressman Raker in the 65th Congress, 2d Session, as H.R. 8716.

The hearings of the Committee on Water Power lasted from March 18 to May 15, 1918, during which period Congress was preoccupied with World War I. H.R. 8716, which was treated as a substitute for the Shields bill, S. 1419, was reported out of the committee with changes, debated and changed further in the House, and passed by the House. The bill reached the Senate on September 19, 1918, and was referred to conference on September 30, 1918. The report of the conference was

¹⁸ In *United States v. Public Utilities Commission of California*, 345 U.S. 295 (1953), at 305, n. 10, the Supreme Court accepted Merrill's testimony before the House Committee on Water Power as presenting the views of the Secretaries of Agriculture, the Interior and War. Merrill remained in government after Pinchot's 1910 discharge and thus was in an influential position to continue Pinchot's policies. His role in developing the FWPA is unique in that he became a principal advisor on water power to Congress, if not the principal advisor, as well as to the President and his Cabinet.

introduced in the House on February 26, 1919, and was passed. The Senate, however, filibustered, and the bill died.

A similarly composed special Committee on Water Power was formed in the House in the 66th Congress, and the bill as agreed to in conference in the previous session was introduced as H.R. 3184. No further hearings were held, and the bill was reported out of the committee. The House and Senate both passed H.R. 3184 with changes, and on January 17, 1920, sent it to conference. Finally, the report of the conference was approved by the House and Senate, and H.R. 3184 was sent to the President on May 31, 1920, shortly before Congress adjourned, and signed by him in time to avoid a pocket veto.

LEGISLATIVE HISTORY OF SECTION 7

Merrill prepared a memorandum dated October 31, 1917, of the principles that were to be embodied in the Administration Bill, stating in pertinent part,

At the termination of license United States to have right to take over the plants [sic] or plants covered by the license, or to transfer them to a State or municipal corporation applying therefore, upon payment of compensation to the original licensee; otherwise the original licensee to have preference right to renewal of license upon compliance with the conditions prescribed by then existing law and regulations.

Licenses should terminate at the end of the fifty-year period in order that the United States may at that time dispose of the privileges as the public interest and the law and regulations then existing may require. In such disposition the order of preference should be as follows: (1) the United States—to acquire properties and operate them for Governmental purposes, (2) the State or municipality—to acquire the properties and operate them for municipal purposes, (3) the original licensee—to secure renewal of the license under conditions prescribed by then existing law and regulations, (4) any other applicant—under similar conditions. These provisions will leave the way open for future public ownership and operation if the experience of the next fifty years shall have established the wisdom of such a policy. In any event,

freedom of action in this respect should not be fore-closed by legislation at the present time.

The memorandum was submitted to and approved by Secretary of Agriculture Houston, and submitted by him to President Wilson. The President approved the memorandum and gave instructions to the three Secretaries to draft a water power bill in accordance therewith.

Thereafter, Merrill drafted a bill which stated in a proviso to Section 15, consistent with the memorandum,

That in issuing such new license, the original licensee shall have a preference right over any other applicant therefor, *except a State or a municipality*. [Emphasis added.]

The hearings and debates on the early water power bills produced proponents of a relicensing preference for initial licensees. Merrill's draft contained what was apparently the penultimate appearance of such a preference prior to the enactment of the FWPA and shows clearly that original licensees were *not* to be preferred over States and municipalities. The proviso was removed from the Administration Bill prior to its introduction in Congress, thus eliminating the original licensee's preference over other private applicants, but not the municipal preference against private original licensees (which was in the first paragraph of Section 7).

The committee of the Departments of Agriculture, the Interior and War (of which Merrill was a member) finalized Merrill's draft and presented the finalized version to the three Secretaries who, on December 14, 1917, transmitted it to President Wilson. Later that month the President presented it to certain House committee chairmen and used his influence to cause them to form a special Committee on Water Power. The Administration Bill was introduced on January 15, 1918, as H.R. 8716, and provided in the first paragraph of Section 7:

That in issuing licenses hereunder, the commission may in its discretion give preference to applications for licenses by States and municipalities for developing power for State and municipal purposes, provided the plans for the same are deemed by the commission to be adapted to conserve and utilize in the public interest the navigation

and water resources of the region; and as between other applicants, the commission may likewise give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interests the navigation and water resources of the region.¹⁹

We observe that in the light of Merrill's memorandum dated October 31, 1917, and the absence of any words restricting the municipal preference to initial licensings, it is clear that Section 7 as introduced provided a discretionary suggestion of choice in favor of States and municipalities in all relicensings, as well as all initial licensings. Some of the private power interests argue, however, that the municipal preference expressed therein applied only to initial licensings because it was conditioned on a Commission finding of "plans" being adapted to the purposes indicated, which refers to the licensing of new projects. But since Section 4 then as now authorized the issuance of licenses for the construction, operation and maintenance of project works, the finding clearly applied to plans for operation and maintenance as well as plans for construction. Similarly, the reference to "developing power" does not limit the municipal preference to initial licensings because those words can mean "generating power" as well as "constructing facilities for generating power".

During the course of the hearings of the Committee on Water Power certain representatives of private power interests indicated that they were reconciled to the proposition of a municipal preference against original licensees. For example, E. K. Hall, Vice President of the Electric Bond & Share Company, and a leading spokesman for private power, testified,²⁰

MR. CANDLER. Now then do you understand that under this bill the Government of course has the first right to retake the property?

¹⁹ House Report No. 715, 65th Congress, 2d Session, dated June 28, 1918.

²⁰ Ellen Dove, *Legislative History of the Recapture Provisions and the Net Investment Concept of the Federal Power Act*, 1966, at 459c.

MR. HALL. Yes, sir.

MR. CANDLER. Then do you further understand it that a provision of the bill further is that some of the [sic., other?] licensees might be preferred over the first licensee?

MR. HALL. The bill provides that; yes, sir. They can take it away and give it to somebody else.

MR. CANDLER. Then the original licensee would have only the third opportunity to count on his lease.

MR. HALL. That is the way I understand it

On the other hand, at one point in those hearings Congressman Sims, Chairman of the Committee on Water Power, expressed his view that the Administration Bill did not contain a municipal preference that was applicable to relicensings. (Dove, at 509).²¹

²¹ Dove, at 509:

The CHAIRMAN. Mr. Secretary, it has been very seriously urged before the committee as a part of the recapture provision that we provide that if the United States Government did not want to avail itself of the recapture provision that a State or municipality which wanted the water power for State or municipal purposes should have the second opportunity and the preference over a private licensee.

Secretary LANE. I think that was in one of the bills, was it not?

The CHAIRMAN. It is not in this one.

Secretary LANE. It seems to me that is a very reasonable proposition.

Mr. FERRIS. I think that is a proposition which has been advanced by Mr. Taylor of Colorado.

Mr. TAYLOR. Yes. I have always very emphatically insisted that they should have a preference right over corporations or over private individuals to take over not only water power, but coal mines and other things for the purpose of preventing extortion in towns and cities, and I hope that when we get through with this legislation that provision will be in here and that it will meet with your approval. I am earnestly hoping that if the Government itself does not see fit and desire to take over these

During the course of those hearings Merrill suggested an amendment to the municipal preference of Section 7 (Dove, at 444) to carry out the purpose of Section 5 of "maintaining priority of application for a license" for citizen and corporate holders of preliminary permits who had expended funds investigating water power sites. On June 28, 1918, the Committee on Water Power committed the bill to the Committee of the Whole House,²² at which time the first paragraph of Section 7 provided,

That in issuing *preliminary permits or licenses* hereunder, the commission may in its discretion give preference to applications ~~for licenses therefor~~ by States and municipalities ~~for developing power for State and municipal purposes~~, provided the plans for the same are deemed by the commission to be *best* adapted to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may likewise give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interests the navigation and water resources of the region.²³

We observe that the amendment appears to have extended the municipal preference of Section 7 to the issuance of preliminary permits, but does not appear to have eliminated that preference with respect to the issuance of licenses pursuant to outstanding preliminary permits, as Merrill had suggested. Additionally, the amendment appears to have eliminated any limitations on that preference that might have been implicit in the phrase "for developing power for State and municipal

matters at the expiration of the 50 years, the preference right shall be given first to the municipalities or states and second to the occupant or the licensee.

In context, because of the absence of an express reference in Section 7 to relicensings, Chairman Sims may have failed to realize that the language of the provision was broad enough to include relicensings.

²² House Report No. 715, 65th Congress, 2d Session. The Administration Bill was treated as an amendment of the Shields bill, S. 1419.

²³ Additions are [*italicized*]; deletions are expunged.

purposes", and to have applied the *best adapted* standard of the second preference to the municipal preference. *But there was no expressed intent to eliminate the municipal preference against private initial licensee-applicants that was contained in the Administration Bill as introduced.*

On the floor of the House, Congressman Doremus proposed an amendment to Section 7 (Dove, at 623) to make the municipal preference mandatory instead of discretionary, except insofar as the Commission would have to determine in its discretion whether the plans of a State or municipality were adapted to conserve and utilize in the public interest the navigation and water resources of the region. His proposal was adopted and, as approved by the House on September 5, 1918, Section 7 provided,²⁴

That in issuing preliminary permits or licenses hereunder the commission ~~may in its discretion~~ *shall* give preference to applications therefor by States and municipalities provided the plans for the same are deemed by the commission ~~to be best~~ adapted to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may ~~likewise~~ give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region.

We observe that in addition to making the municipal preference mandatory, although subject to a finding in the discretion of the Commission, the words "to be best" were deleted so that States and municipalities would not be required to submit

²⁴ S. 1419, 65th Congress, 2d Session, as printed September 6, 1918.

The debate on the floor of the House (Dove, at 623-5) shows clearly that the Commission would have discretion in administering the municipal preference. Congressman Doremus said,

You have got to leave the discretion to determine whether the plans are adequate to serve the public interest with somebody, and necessarily it must be with the commission created in the bill.

plans that were better than those of citizens and corporations. The word "likewise" was deleted as being "not necessary" in view of the change to the municipal preference. *There still was no expressed intent to eliminate the municipal preference against private initial licensee-applicants that was contained in the Administration Bill as introduced.*

The House-approved bill was referred by the Senate on September 19, 1918, to a conference, where it stalled. On February 26, 1919, the conference reported a bill²⁵ in which Section 7 was changed to read,

That in issuing preliminary permits *hereunder* or licenses ~~hereunder~~ *where no preliminary permit has been issued* the commission shall give preference to applications therefor by States and municipalities provided the plans for the same are deemed by the commission *equally well* adapted to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region.

The explanation of the foregoing changes in House Report No. 1147 is, "Your committee thought these changes were in the interest of clarity."

It appears that the committee of conference obscured more than it clarified. It is apparent that the committee settled on the "equally well adapted" standard in the light of the disagreement of the House and the Committee on Water Power on an appropriate standard. And it is equally apparent that "hereunder" was transposed and "where no preliminary permit has been issued" was added to eliminate the municipal preference with respect to licenses that were issued pursuant to outstanding preliminary permits, as Merrill had suggested to the Committee on Water Power.

²⁵ House Report No. 1147, 65th Congress, 3d Session.

But the reference to "licenses where no preliminary permit has been issued" in conjunction with "preliminary permits" made it *appear* that the municipal preference applied only to the issuance of preliminary permits and some initial licenses; i.e., those where no preliminary permit had been issued. *In point of fact, there was no expressed intent to eliminate the municipal preference against private initial licensee-applicants that was contained in the Administration Bill as introduced.* In point of fact, the issuance of a successor or new license is the issuance of one "where no preliminary permit has been issued".²⁶ Therefore, Section 7 continued to provide a preference in favor of States and municipalities in all relicensings.

As will be seen, the language that emerged from the conference committee "in the interest of clarity" is the touchstone of the present controversy. The public power interests go back to Section 7 of the Administration Bill as introduced and argue that the municipal preference contained therein for all relicensings was never changed. The private power interests look to Section 7 as it emerged from the conference committee and argue that it contains no municipal preference for relicensings.

The report of the conference was adopted by the House but was still pending in the Senate when Congress adjourned on March 4, 1919. When the 66th Congress convened, a bill identical to that in the report of the conference was introduced as H.R. 3184 and, on June 24, 1919, was reported without

²⁶ The language creates a latent ambiguity in a situation in which a successor license would follow an initial license which, in turn, would follow a preliminary permit. It would seem, however, that the reference to no preliminary permit having been issued means a permit immediately preceding the license under consideration, that is still outstanding. If the committee had said, instead,

That in issuing preliminary permits or licenses, other than licenses pursuant to outstanding preliminary permits, . . .

then, perhaps, the controversial Pinchot/Lenroot/Jones amendment, *infra*, would not have been necessary.

change to the Committee of the Whole House. On the floor of the House, Congressman Sinnott proposed an amendment that would permit States and municipalities to amend their plans to make them "equally well adapted" to those of competing private applicants so that such public applicants would not be foreclosed from obtaining licenses because their plans were not as well adapted. The amendment was approved on July 1, 1919, and Section 7 then read,

That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted, *or shall be made equally well adapted*, to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region.

The House-approved bill was referred to the Senate and was reported out of the Committee on Commerce with amendments on September 12, 1919. Senate Report No. 180, 66th Congress, 1st Session, states in this connection,

Every year that our water powers are undeveloped means a loss to the people in one form or another, almost, if not quite, equal to the cost of their development. Legislative action should be delayed no longer. We should do one of two things: We should pass legislation which will lead private capital and enterprise to develop these resources under such regulations as will give consumers good service and cheap power, or the Government itself should proceed to make this development. *This bill proceeds on the theory of private development with ultimate public ownership possible.* [Emphasis added.]

Section 7, as reported to the Senate, provided,

That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued *and in issuing licenses to new licensees under section 15 hereof* the commission shall give preference to applications therefor

by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted, or shall *within a reasonable time to be fixed by the commission* be made equally well adapted, to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region *if it is satisfied as to the ability of the applicant to carry out such plans.*

Although the report of the Committee on Commerce does not explain how the phrase "and in issuing licenses to new licensees under section 15 hereof" came to be added to Section 7, it was added as a result of the following events: Senator Jones, Chairman of the Committee on Commerce, and a friend of private power, had introduced a water power bill (S. 152) in which Section 7 was identical to Section 7 of the bill reported out of conference in the previous session. Senator Lenroot, a conservationist, had introduced another bill (S. 1192) that was a pro-conservationist revision of the bill reported out of conference in the previous session. On June 25, 1919, Pinchot, who was then President of the National Conservation Association, wrote to Senator Jones suggesting a number of changes for Jones' S. 152 including, with respect to Section 7,

The obvious intention of Sec. 7, is to give preference to States and municipalities; and you will not be accomplishing this purpose *surely*, unless you insert after the word "issued" in line 11, page 12, of your bill, the words "and in issuing licenses to new licensees under Sec. 15 hereof", or word of like import. [Emphasis added].

Pinchot took the suggested language from Lenroot's S. 1192, and that language, as suggested, was added to H.R. 3184.

We observe that there still was no expressed intent to eliminate the municipal preference against private initial licensee-applicants that was contained in the Administration Bill as introduced. The intent as expressed by Pinchot was just the opposite—to clarify Section 7 so that the municipal preference

therein would “surely” apply to relicensings. If States and municipalities had such a preference against private initial licensee-applicants immediately prior to the amendment, and if “new licensees” refers to any licensees under a new license (as the public power interests contend), then the Pinchot/Lenroot/Jones amendment was of a clarifying nature, as Senate Report No. 180 characterized most of the amendments therein. But if States and municipalities had such a relicensing preference immediately prior to the amendment, and if “new licensees” refers to any licensees except an original licensee (as the private power interests contend), then the Pinchot/Lenroot/Jones amendment would have restricted the scope of the municipal preference contrary to Pinchot’s conservationist philosophy. Some of the private power interests recognize that inconsistency and, therefore, argue from the language of Section 7 that States and municipalities did not have such a relicensing preference immediately prior to the Pinchot/Lenroot/Jones amendment and, therefore, that amendment gave them a limited relicensing preference²⁷ consistent with Pin-

²⁷ Limited to situations in which private initial licensees do not become applicants for new licenses—which the public power interests contend are situations in which projects are not worth relicensing. And limited to situations in which the Commission first determines not to issue new licenses to private initial licensee-applicants—which the public power interests contend require a non-existent two-step relicensing procedure. If there were such a procedure, they say, the Commission would first determine whether or not to issue a new license to the initial licensee; and, if it does so, the Commission would give a *de facto* preference to initial licensees, contrary to the legislative history opposing perpetual licenses. It should be noted, in this connection, that one of the principle [sic] purposes of the 1968 amendments to the FPA was to eliminate a three-step procedure by which Congress would approve Commission recommendations not to take over projects before the Commission would fix the terms of and issue new licenses. It should also be noted that it is the practice of the Commission to decide questions pertaining to the identity of licensees and the terms of contested licenses at the same time.

chot's conservationist philosophy. They contend that Pinchot proposed the amendment because there was either no municipal relicensing preference or an uncertain municipal relicensing preference in Section 7 in view of its silence with respect to relicensings. But that would have been a substantive rather than a clarifying change, as Senate Report No. 190 indicates. And although they also contend that the question of whether Section 7 contained a municipal relicensing preference became moot when Congress addressed relicensing in the Pinchot/Lenroot/Jones amendment, the existence or nonexistence of such a preference appears to continue to be material to the Commission's interpretation of the language of that amendment.²⁸

The bill reported out of the Committee on Commerce was approved by the Senate on January 15, 1920, without change to Section 7, and the House and Senate versions were sent to conference. The Conference Report issued April 30, 1920 (House Report No. 910, 66th Congress, 2d Session) recommended that the House recede from its opposition to the Senate amendments, which were described therein as being "verbal changes" that were "desirable, as they clarify the text", with the exception that the last phrase added by the Senate would be revised to read, "if it be satisfied as to the ability of the applicant to carry out such plans."

²⁸ The Initial Decision pertaining to the Walters Hydro-electric Development (*Carolina Power & Light Company*, Project No. 432), was based on the "plain meaning" of "new licensees" in Section 7(a) and suggests that the presiding judge did not understand the legislative history of the Pinchot/Lenroot/Jones amendment. The Initial Decision states, mimeo, at 10,

While it is true that Mr. Merrill intended the preference to also apply in renewal proceedings against the original licensee, the fact remains that Congress changed the original text by adding the word "new" before licensee in Section 7(a). The Senate Committee on Commerce Report that added the word "new" offered no comments whatsoever on this amendment.

Merrill, under date of January 27, 1920, prepared a memorandum on the Senate amendments to H.R. 3184 which stated that the amendments to Section 7 "strengthen" it; and under date of April 27, 1920, prepared a memorandum for Congressman Lee, a member of the committee of conference, stating,

In the development of water powers by agencies other than the United States, the bill gives preference to States and municipalities *over any other applicant*, both in the case of new developments and *in case of acquiring properties of another licensee at the end of a license period*. [Emphasis added.]

On May 4, 1920, Congressman Lee used Merrill's exact words to assure his colleagues with respect to the municipal preference (Dove, at 814), and the Conference Report was approved by the House on the same day.

The Conference Report was approved by the Senate on May 28, 1920, and H.R. 3184 was transmitted to President Wilson on May 31, 1920. Another Merrill memorandum, dated June 8 or 9, 1920, advised the President,

For development by agencies other than the United States preference is given to States and municipalities. *A similar preference is given for the acquisition of the properties of other licensees at the end of a license period*. [Emphasis added.]

As indicated, President Wilson signed H.R. 3184 on June 10, 1920.

THE PLAIN MEANING OF "NEW LICENSEES"

Section 7(a) of the FPA provides, in pertinent part,

. . . [I]n issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities . . .

While the public power interests contend that "new licensees" plainly are any licensees under new licenses, the public power [sic] interests argue that "new licensees under section 15" are

distinguished from "original" licensees, just as is done in Section 15(a). They say that a phrase used in different parts of a statute is to be given the same meaning throughout, unless the context clearly indicates otherwise,²⁹ and that a statute should be construed to give effect to all of its words.³⁰ And they conclude,

When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), n.29, at 184.

THE 1968 AMENDMENTS TO THE FEDERAL POWER ACT

The FPA contains no provisions for renewing or extending licenses. As enacted in 1920 and reenacted in 1935, Section 14

²⁹ Their reliance on Section 22 is proper because that provision, which pertains to a "new licensee" assuming Commission-approved contracts, distinguishes between an "original licensee" and a "new licensee" in the same context as Section 15(a). But their reliance on Section 7(c) is improper, first, because that provision was not enacted in 1920, but in 1968, and second, because that provision would not be changed by omitting the [*italicized*] words:

Whenever . . . the Commission determines that the United States should . . . take over any project . . . the Commission shall not issue a new license to the *original licensee* or to a *new licensee* but shall submit its recommendation to Congress . . . [Emphasis added].

Similarly, their reliance on Section 15(b) is improper because that provision also was enacted in 1968 and uses "new licensee" in the same context as Section 15(a).

³⁰ They argue that the public power interests construe "to new licensees" as having no significance, so that the phrase would read, "in issuing licenses under section 15 hereof." The public power interests reply that "to new licensees under section 15" refers to long-term licenses under that provision, as distinguished from annual licenses thereunder which can be issued to the "then licensee". They say that annual licenses possibly could have been confused with long-term licenses if "to new licensees" had been omitted from Section 7(a).

gives the United States "upon not less than two years' notice in writing from the commission . . . the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects . . ." upon the payment of the net investment plus severance damages. If the United States does not do so, Section 15 authorizes the Commission to issue a new or successor license. And if the Commission does not do so "upon reasonable terms", Section 15 directs the Commission to issue annual licenses to the "then licensee" under the terms and conditions of the original or predecessor license "until the property is taken over or a new license is issued. . . ."

As a result of these provisions, a three-step takeover/relicensing procedure developed in the 1960's, as the 50th anniversary of the FWPA and the reality of expiring licenses approached. First, the Commission submitted information on expiring licenses to Congress together with its recommendations regarding takeover. Second, Congress considered and acted on the recommendations. And third, since no projects were taken over, the Commission considered and acted on the applications for new, or successor, licenses.

In 1967 the Commission proposed certain amendments to the FPA that would eliminate that three-step procedure and permit it to consider takeover recommendations and relicensing applications at the same time. The proposal was unopposed and, as enacted in 1968, added Sections 7(c), 14(b) and 15(b) to the FPA.³¹ Under the new procedure, any Federal department or agency may recommend during the course of any relicensing

³¹ The Act (Public Law 90-451) recited that its purpose was "to clarify the manner in which the licensing authority of the Commission and the right of the United States to take over a project or projects upon or after the expiration of any license shall be exercised." One substantive provision, that would have permitted the Commission to amend licenses to impose "further reasonable requirements", was omitted from the final bill.

proceeding that the United States take over the project or projects in question, and if the Commission agrees, it is required to submit its recommendation to Congress and may not issue a new license. But if the Commission does not agree, it is required, upon request by a Federal agency recommending takeover, to stay the effective date of its order issuing a new license to give Congress two years to consider takeover. Thus, Congress would consider only projects recommended for takeover, rather than all projects.

During the course of the hearings on the 1968 amendments the Commission's General Counsel testified with respect to the House and Senate bills (Hearings on H.R. 12698 and H.R. 12699, at 32),

They are procedural bills designed solely to permit the recapture and relicensing determinations to be made efficiently and in harmony with the purpose underlying the limited term license. There has been no attempt to modify the substantive standards which the Commission is required to apply in determining whether or not to recommend recapture and in passing upon relicensing proposals.

and, at 34,

Another issue which has received considerable attention in the Senate hearings relates to the substantive question of the relative rights of the existing licensee and other would-be applicants in a relicensing proceeding before the Commission in the event Congress does not act to recapture a project. The Commission bill does not attempt to deal with this question.

The report of the House Committee on Interstate and Foreign Commerce on the amendment bill (House Report No. 1643, 90th Congress, 2d Session) did not address the municipal preference of Section 7(a). The report of the Senate Committee on Commerce on the amendment bill (Senate Report No. 1338, 90th Congress, 2d Session), on the other hand, did address that preference, as follows:

During the course of the hearings on S. 2445, your committee heard considerable testimony on the question

of whether the preference which is extended under subsection 7(a) of the Federal Power Act to States and municipalities in their application for a license for a new hydroelectric power project also extends to those cases where an existing private power hydroelectric project license has expired, and in addition to the original licensee's application for a new license, a State or municipality also files an application for the new license.

Your committee was impressed by the testimony of the Federal Power Commission concerning its interpretation of the law in this area and the policy it now applies to implement the law.³² In his letter of August 28, 1967, to the Vice President, submitting the proposal which became S. 2445, Chairman Lee White stated:

Under section 7(a) of the Federal Power Act the Commission is instructed to give preference to applications by States and municipalities in issuing licenses to new licensees under section 15. Our General Counsel has advised us that this preference applies only after it has determined that the original licensee should not receive a new license. In those instances where the original licensee and another applicant seek a new license for the same project, the Commission believes that the new license is to be issued to whichever applicant can best meet the standards of the act. In those rare cases where the two applicants are equally matched the Commission believes that the new license should be issued to the original licensee so long as he can meet the standards of the act at least as well as the other applicant.

And further on in the same letter he said:

[Finally we have considered establishing an additional preference for the original licensee to apply in cases where a rival applicant could slightly better achieve the objective of the Act.]³³ We believe that all other things being equal,

³² Contrary to the committee's expressed belief that the Commission's General Counsel's interpretation was then being applied as a work practice, the Commission is only now addressing the applicability of the municipal preference to relicensings for the first time in a proceeding under the FPA.

³³ The bracketed sentence was in Chairman White's letter and is added back to restore the context.

continuity in ownership and management is a value in itself which should be recognized and is to be recognized under the present statute. However, when another applicant demonstrates a superior ability to meet the congressional objectives, in our view no preference should assure the position of the original licensee.

If the original licensee files an application for a new license, unless the Commission finds that the project, with such modifications and conditions as it may prescribe, would not be best adapted to a comprehensive plan for improving or developing the waterway involved, the Commission then would issue to the original licensee a new license containing such modifications and conditions as it may find appropriate or necessary.

Continuity of ownership and management is desirable to avoid possible interruption of service resulting from the severance of a project from an integrated system, the upsetting of existing tax patterns which are a substantial source of revenue to many communities, the dislocation of jobs, and other possible adverse results. Granting of the license to a different licensee can only be justified when the existing licensee is unable or unwilling to carry out whatever modifications are found to be necessary for comprehensive development of the waterway or to meet the standards of the act.

Section 14 of the existing act expressly reserves the rights of the States and municipalities to take over any project by condemnation proceedings upon payment of just compensation. States and municipalities, therefore, have a priority which can be exercised by eminent domain before, during, or after relicensing. On the other hand, if the State or municipality does not exercise this priority, and the existing licensee is willing and able to develop, redevelop, and operate the project so that it would be best adapted to a comprehensive plan for improving or developing the waterway involved, the new license should be issued to the existing licensee.

Chairman Magnuson and Senators Hart, Brewster and Moss expressed their supplemental (minority) views, as follows:

S. 2445, introduced at the request of the Federal Power Commission, was designed merely to clarify the procedure to be followed upon the expiration of existing hydro-

electric power project licenses. No substantial changes in the Commission's licensing authority were intended in this amendment to the Federal Power Act.

For this reason, no provision was made in the bill for priorities or preferential rights on relicensing, and it is our opinion that the committee report should remain silent on this issue.

Under section 7(a) of the act, the Commission is instructed to give preference to applications by States and municipalities in issuing original licenses and "in issuing licenses to new licensees under section 15," the relicensing provision. It is not clear what this language means and *it has never received either formal administrative or judicial interpretation*. The publicly owned utilities interpret the provision to require application of their preference on relicensing, arguing that when an original license expires, a new license must necessarily be issued to a "new licensee." The privately owned companies disagree, arguing that if the original licensee is seeking relicense, he is not a "new licensee" and the preference should not apply. In fact, the privately owned companies content [sic., contend] that a preference should lie with the existing licensee. In addition, the rural cooperatives have requested a statutory amendment providing them with the same preference as public agencies, to apply on relicensing as well as original licensing [Emphasis added].

Succinctly stated, the issues are (a) whether the statutory preference for public development of our water resources applies on relicensing; (b) whether the public agency preference should be extended to rural cooperatives; and (c) whether the existing licensee should have a preference or priority on relicensing.

No attempt should be made to resolve these difficult questions without careful research and study and a clear understanding of the implications of any decision reached. The suggestions of the various parties go beyond the scope of the bill as presented to the Congress and this committee.

Furthermore, continuity of ownership and management, tax revenues, and employment opportunities, factors mentioned in the majority report, are not the criteria

which the act directs the Commission to consider in the issuance of licenses. Similarly, nothing in the act indicates that it is in accord with the majority's view that granting of a license to a new licensee "can only be justified when the existing licensee is unable or unwilling" to carry out modification of the project. The standard to be utilized in the issuance of both licenses and relicenses is found in section 10(a) of the Federal Power Act.

S. 2445 is primarily a procedural, housekeeping bill providing congressional direction for the relicensing process. The legal, constitutional, and policy questions raised in the majority report seriously change the tenor and import of this bill. Only [sic., Only] administrative changes should be considered in this bill, and substantive changes in the Power Act, is [sic., if] needed or desired, should be considered at a separate time.

For these reasons, we cannot subscribe to that portion of the report which relates to section 7(a) of the Federal Power Act.

The private power interests contend that the 1968 amendment of Section 7 was a reenactment of that provision and that Congress, by amending the FPA in 1968 with knowledge of the Commission's interpretation of the municipal preference, thereby approved the Commission's interpretation. They contend, additionally, that that interpretation cannot be changed now by Commission action. And they cite, among other decisions, *Kay v. Federal Communications Commission*, 443 F.2d 638 (D.C. Cir., 1970), at 646,

[A] consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has Congressional approval.

PG&E, in its initial brief at 22, claims that the facts involved in the enactment of the 1968 amendments are essentially indistinguishable from the facts considered by the court in *Association of American Railroads v. Interstate Commerce Commission*, 564 F.2d 486 (D.C. Cir., 1970), which is one of the leading cases on the subject. Santa Clara responds do that claim at 70 of its reply brief, saying that PG&E's claim is not

supported by the decision. This "doctrine of reenactment" is discussed *infra*.

The public power interests and the staff counsel take the position that the 1968 enactment of Section 7(c), pertaining to the procedures interrelating relicensing and takeover, was not a reenactment of Section 7(a), pertaining to the standards for selecting applicants, and consequently the "doctrine of reenactment" does not apply. They contend that there is no long-standing Commission application and consequent interpretation of the municipal preference in rulemaking or contested adjudicatory proceedings, as is required under the doctrine, and as proved by the fact that the Commission initiated this declaratory order proceeding for the purpose of developing a working interpretation of that preference. And they contend that while one committee report seemed to approve the Commission's General Counsel's interpretation, there is no proof that Congress as a body approved that interpretation.

LICENSE TRANSFEREES AS "ORIGINAL LICENSEES"

While all of the parties do not address the second issue for declaratory order specified in the order of May 3, 1979, all who address it except the staff counsel and Santa Clara appear to agree with one another that an assignee or successor licensee is an "original licensee" within the meaning of Section 15(a).³⁴ They cite Section 8 of the FWPA, which is now Section 8 of the FPA, as follows:

That no voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the Commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all of the conditions of the license under which such rights are held by such licensee and also subject to all

³⁴ The Commission staff counsel says that the issue is moot if it is found that the municipal preference is applicable to relicensings against original licensees that are not States or municipalities.

the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee hereunder: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

The Hydro Group contends, in this connection, that the clear purpose of Section 8 is to place transferees in the shoes of original licensees. They argue: (1) that the Commission can issue new licenses under Section 15 only to "new licensees" and "original licensees", (2) that "new licensees" and "original licensees" are mutually exclusive, (3) that transferees are in possession of project works while "new licensees" are not, and (4) that if transferees are not "original licensees" the Commission has no authority to issue new licenses to them, which would produce an absurd result. And PG&E argues that the statutory language that

. . . any successor or assign . . . shall be . . . subject to *all* the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee [Emphasis added] . . .

leaves no doubt that the treatment prescribed for "assigns" carries through "all the provisions" of the FPA, including Section 15.

Santa Clara contends, on the other hand, that PG&E is not the "original licensee" (in the sense of the first licensee) of the Mokelumne River Project because it is a transferee from the "original licensee",³⁵ stating,

[S]ince the Section 15(a) term "then licensee" encompasses both an "original licensee" and a "present licensee",

³⁵ PG&E was the first licensee of several projects that were consolidated under the docket number, or project number, of the Mokelumne River Project, as to which PG&E was a transferee licensee. As a result of the consolidation, PG&E became both a transferee licensee and the first licensee of portions of that project as then licensed.

and PGandE is clearly the "present licensee", PGandE cannot even claim the benefit of any possible 15(a)-7(a) exclusion of "original licensees" from the municipal preference. As something different from the "original licensee", PGandE would, without question, fall literally within the 7(a) municipal preference in renewal contests: "... in issuing licenses to new licensees."

APPLICABILITY OF SECTION 7(a) TO RELICENSINGS

Plain Meaning

We turn first to the question of the plain meaning of "new licensees" because we are admonished by some of the parties not to look at the legislative history if that term has a plain meaning in Section 7(a).

In *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), the Supreme Court reversed the Tenth Circuit (507 F.2d 743 (1974)) for its failure to consider the legislative history of the term "pollutant" as used in the Federal Water Pollution Control Act (FWPCA), stating, at 9,

To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" [Citations omitted.]

Two years later, however, in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Supreme Court said, at 184, n. 5,

When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. [Citation omitted.] Here it is not necessary to look beyond the words of the statute. *We have undertaken such an analysis* only to meet Mr. Justice Powell's suggestion that the "absurd" result reached in this case . . . is not in accord with congressional intent. [Emphasis added.]

Coming closer to "home", the District of Columbia Circuit held in *Chemehuevi Tribe of Indians v. Federal Power Com-*

mission, 489 F.2d 1207 (1973), that steam plants are not licensable as such under the FPA, stating, at 124 (footnotes omitted),

It is true, as petitioners point out, that the literal language of § 4(e) appears to include steam plants. . . . Under the "ordinary man" or "plain meaning" canon of statutory construction, petitioners argue, the utilities here are constructing facilities described by the Act, and there is, accordingly, no need to resort to legislative history or other extrinsic aids.

In answering a similar argument, the Second Circuit has said:

We reject this line of maxims of statutory construction in favor of Judge Learned Hand's more practical instruction that "[w]ords are not pebbles in alien juxtaposition," [NLRB v. Federbush Co., Inc., 121 F.2d 954, 957 (2d Cir. 1941)] and therefore turn first to [the Act's] legislative history.

Our role is to give effect to the intention of Congress as it may be discerned by reference to the historical background of the legislation as well as to the particular words chosen by the Congress to express its purpose. The use of extrinsic aids such as legislative history to determine congressional purpose is appropriate not only where the words of the statute are ambiguous but also "when the literal words would bring about an end completely at variance with the purpose of the statute." [Emphasis added.]

Turning first to the words chosen by Congress, the fact that the public power interests have been able to provide one reasonable interpretation to "new licensees" without reference to extrinsic construction aids, chiefly through its context in Section 7(a), and the further fact that the private power interests attribute a different meaning by following the reference in Section 7(a) to Section 15 of the FWPA, which is Section 15(a) of the FPA, suggest that there is a sufficient ambiguity as to the meaning of "new licensees" that it would be appropriate to turn to the legislative history.

But if that suggestion is not enough, we observe that the public power interests and the Commission staff counsel have failed to challenge a hypothesis that is implicit in the position of the private power interests—that the term “new licensee”, which is used three times in Section 15(a), has a meaning that can be carried forward into Section 7(a). And we conclude that it has no such meaning because the contexts of usage are different.

Just as the private power interests follow the reference in Section 7(a) to Section 15(a), our analysis follows the reference in Section 15(a) to Section 14 of the FWPA, which is Section 14(a) of FPA. That provision is concerned with the subject of takeover upon or after the expiration of any license, and uses the term “licensee” eight times to refer to the citizen, corporation, State or municipality that is in possession of a project under an expiring or expired long-term license.³⁶ Section 14(a) also uses the term “United States” three times to refer to the government that must pay the net investment plus severance damages to the “licensee”, and must assume certain contracts, before taking possession.

Section 15(a), on the other hand, is concerned with the subject of successor licenses if the “United States” does not, at the expiration of the “original license”,³⁷ take over the project works of the “licensee”—using the term “licensee” in the same context as in Section 14(a) to mean the citizen, etc., in possession under an expiring or expired long-term license.

³⁶ If a “licensee” is in possession under an expired long-term license, it would also be in possession under a current annual license since the FPA is designed to avoid gaps between long-term licenses.

³⁷ If the term “original license” as used in its first appearance in Section 15(a) does not refer to the expiring or last expired long-term license, which might or might not be the first license, then the Commission would have authority under Section 15(a) to relicense project works only once. A literal reading of “original license” to mean the first license in all cases would produce an absurd result that

Thereafter, Section 15(a) uses the term "original licensee" (instead of "licensee" as in Section 14(a)) two times to refer to the citizen, etc., that is in possession under an expiring or expired long-term license, and not necessarily the first licensee. And it uses the term "new licensee"³⁸ three times to refer to the citizen, corporation, State or municipality (in lieu of the "United States" in Section 14(a)) that must pay the net investment plus severance damages to the "original licensee", and must assume certain contracts, before taking possession.

*In other words, "original licensee" and "new licensee" are used in Section 15(a) as correlative terms to describe a predecessor/successor relationship in a context of successive license terms.*³⁹ Section 15(a) authorizes the Commission to issue successor licenses to any citizen, etc., eligible for an initial license.⁴⁰ And it is necessary to distinguish between the

would bring about an end completely at variance with the purpose of the FPA.

Furthermore, it is appropriate to construe the words "original" and "new" consistently within Section 15(a) to have their same respective meanings preceding both "license" and "licensee".

³⁸ "New licensee" is an unfortunate choice of terms because an applicant for a successor license (that is not an "original licensee" in possession) does not become a licensee until the license is accepted *after issuance*.

³⁹ This interpretation disposes of the second issue raised in the Commission's order of May 3, 1979. An "original" licensee in the context of Section 15(a) is a predecessor licensee in possession, which status has no relationship to the question of whether that licensee is also the "original" or first (or initial) licensee in the context of Section 8, or an assignee or successor of the first (or initial) licensee.

⁴⁰ The municipal preference issue in this proceeding pertaining to the meaning of "new licensees" in Section 7(a) is not the only major issue spawned by the Pinchot/Lenroot/Jones amendment. It has been argued that in view of the words in Section 7(a) "in issuing licenses . . . under section 15 hereof", the Commission's authority in issuing successor licenses is limited to Section 15(a), excluding Sec-

“original licensee” in possession and a “new licensee” not yet in possession because a successor licensee must pay the net investment plus severance damages to the “original licensee”, and must assume certain contracts, *only* if that successor is not also the predecessor licensee.⁴¹

Finally, Section 15(a) provides that if the United States does not take over the project works and the Commission does not issue a successor long-term license, then the Commission shall

tion 4(e) pertaining to the issuance of licenses generally. Accordingly, it has also been argued that the Commission doesn't have to find under Section 4(e) that a successor license will not interfere or be inconsistent with the purpose for which a reservation was created or acquired, and that a successor license is not subject to and need not contain the conditions that a departmental Secretary deems necessary for the adequate protection and utilization of the reservation. The issue was addressed in Opinion No. 36 (*Escondido Mutual Water Company*, Project No. 176), issued February 26, 1979, wherein the Commission indicated (mimeo, at 98) that Section 15(a) does not specify (1) *to whom* successor licenses may be issued (to citizens of the United States, associations of such citizens, certain corporations, States and municipalities), (2) *for what purposes* they may be issued (for constructing, operating and maintaining project works, or utilizing surplus water or water power) and (3) *on what jurisdictional bases* they may be issued (bodies of water over which Congress has jurisdiction, public lands and reservations of the United States, and Government dams), all of which are supplied by Section 4(e). The issue was not reached in Opinion No. 36 because the successor licensing therein was treated partly as an initial licensing and partly as a relicensing.

⁴¹ Section 22, which is concerned with certain contracts for the sale and delivery of power, uses the term “licensee” once in the same context as in Section 14(a) to mean the citizen, etc., in possession, in a context in which it is not necessary to distinguish between the citizen, etc., not yet in possession. It also uses the correlative terms “original licensee” and “new licensee” once each in the same context as in Section 15(a) when it is necessary to make such a distinction, for a successor licensee must assume certain contracts only if that successor is not also the predecessor licensee.

issue annual licenses to the "then licensee"—which is almost but not quite the same as the "licensee" in possession in Section 14(a) and at the beginning of Section 15(a), and the "original licensee" in possession thereafter in Section 15(a). Since the recipient of an annual license must always be in possession, a "then licensee" differs from a "new licensee" conceptually in that there is no need to distinguish between a successor in possession from one not yet in possession. And since annual licenses may succeed predecessor annual licenses as well as long-term licenses, a "then licensee" differs from a "licensee" conceptually in that it includes a citizen, etc., in possession under an expiring or expired *annual* license.⁴²

There are two places in the FPA at which the terms "original licensee" and "new licensee" are used separately and not correlatively. The term "original licensee" is used in Section 8, *supra*,⁴³ to mean the first or initial licensee in the context of a single license term. Although the words "or otherwise" in Section 8 are inclusive enough to cover a successor licensee in the context of successive license terms, the words "any successor or assign . . . shall be subject to all the conditions of *the license under which such rights are held*" (emphasis added) appear to limit the overall context to a single license term. In other words, a Section 8 "original licensee" is a first or initial licensee within a license term, whereas a Sections 15(a)/22 "original licensee" is a predecessor licensee as between two license terms. The term "original licensee", when used alone in

⁴² Consistent with the interpretation of the word "original" herein, in Opinion No. 36 (*Escondido Mutual Water Company*, Project No. 176), issued February 26, 1979, the Commission (mimeo, at 191) interpreted the term "original license" in the proviso of Section 15(a) as distinguishing the expiring license from a "new license", "and not as referring to the terms imposed by the expiring license when it was originally issued."

⁴³ Section 8 uses the term "such licensee" in two places without an antecedent reference to "such". Nonetheless, "such licensee", like "original licensee", appears in context to refer to the first licensee.

Section 8, does not have the same meaning as the same term when used in correlation with "new licensee" in Sections 15(a) and 22. And since it doesn't, there is no reason to require the term "new licensees", when used alone in Section 7(a), to have the same meaning as the term "new licensee" when used in correlation with "original licensee" in Sections 15(a) and 22.

Sections 15(a) and 22 are concerned with predecessor/successor relationships in a context of successive license terms. Section 7(a), as the Hydro Group concedes, is concerned with the standards to be applied by the Commission in choosing among applicants.⁴⁴ It is concerned with choosing applicants as licensees for the forthcoming license term, whether that is the initial term or a successor term. But like Section 8, and unlike Sections 15(a) and 22, it is concerned with the single license term under consideration. Accordingly, we conclude on the basis of the intrinsic evidence within the statute that Section 7(a) "new licensees" are those who may be chosen (i.e., the applicants) for the new or forthcoming license term, which

⁴⁴ In certain places in the FPA the reference to the issuance of licenses is troublesome if restricted literally to the ministerial act of issuance. In Opinion No. 36-A (*Escondido Mutual Water Company, et al.*, Project No. 176), for example, we said, at 21, that the reference in Section 4(e) to the issuance of licenses "within any reservation" would not be construed literally to refer to a Commission vote upon the issuance of a license when the members of the Commission are physically within a reservation. So, too, the reference in Section 7(a) to "issuing licenses" should not be restricted to the ministerial act of issuance. Since the Commission is required to make certain findings either before or in conjunction with its vote on the issuance of a license, the reference in Section 7(a) to "issuing licenses" should include the overall consideration of applications for licenses. And in that context, the more-inclusive phrase "in issuing licenses to new licensees" would mean, simply, "in considering applications of new licensees", or, as Santa Clara argues (*supra*, at note 15), "in determining whether to issue licenses to new licensees". See, also, note 38, *supra*, which indicates that "new licensee" is an unfortunate choice of terms.

status has no necessary relationship to the question of whether they are “new” or successor licensees as between two license terms in the context of Section 15(a). In any event, there should be sufficient doubt as to whether “new licensees” in the context of *Section 7(a)* are identical to a “new licensee” in the context of Section 15(a), to merit a look at the legislative history.⁴⁵

Legislative History

Having concluded that a Section 8 “original licensee” may not be the same as a Sections 15(a)/22 “original licensee”,⁴⁶ we turn to the legislative history to ascertain the identities of the Section 7(a) “new licensees”. There are two principal aspects to scrutinize—the introduction of the Administration Bill, and the Pinchot/Lenroot/Jones amendment.

Upon its introduction, the Administration Bill provided in the first paragraph of Section 7, in pertinent part,

That in issuing licenses hereunder, the commission may in its discretion give preference to applications for licenses by States and municipalities. . . .

Like Section 4(d) of the FWPA authorizing the Commission generally to issue licenses (which is now Section 4(e) of the FPA), there were no words expressly including or excluding successor licenses. The claims of the private power interests that the reference to “plans” for “developing” power limited

⁴⁵ Although Section 7(a) is concerned with choosing applicants as licensees, we note that the Commission is directed to give preference to applications (documents) of States and municipalities, and authorized (not consistently) to give preference “as between other applicants”. This is a further example of non-consistent language noted in other parts of this Opinion and order.

⁴⁶ They are the same only when the “original” or first licensee under a license retains its status of being the licensee through the expiration of that license, thus becoming the “original” or predecessor licensee of the successor license.

the preference to initial licenses, are totally unpersuasive. The plans were to be adapted "to conserve and utilize . . . navigation and water resources", which includes operation as well as construction, and, therefore, refers implicitly to successor licenses as well as initial licenses. Considering that "in issuing licenses", without limiting words, refers to all licenses, and considering the intent concerning preferences that was expressed in Merrill's memorandum of October 31, 1917, it appears that the municipal preference in Section 7 of the Administration Bill clearly applied to the issuance of all successor licenses.

After the introduction of the Administration Bill, the first paragraph of Section 7 was amended, first, so that the municipal preference would apply to the issuance of preliminary permits (which can happen, if at all, only prior to the issuance of an initial license), and second, so that the municipal preference would *not* apply to the issuance of initial licenses associated with outstanding preliminary permits. Considering that there were no words expressly including successor licenses, and that words were added to include preliminary permits and exclude initial licenses associated with outstanding preliminary permits, the application of the municipal preference to successor licenses became obscured through the successive amendments.

Eventually, the Pinchot/Lenroot/Jones amendment changed the pertinent language to read,

That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued *and in issuing licenses to new licensees under section 15 hereof* the commission shall give preference to applications therefor by States and municipalities. . . .

That amendment changed the context of the first 15 words significantly. Immediately prior to the amendment there still were no words expressly concerned with (either including or

excluding) the issuance of successor licenses and, consequently, the words of the Administration Bill "in issuing . . . licenses" continued to refer to all licenses. The words had been amended, however, to say "in issuing . . . licenses where no preliminary permit has been issued", thus excluding *initial* licenses that were associated with outstanding preliminary permits. But, as in the Administration Bill, they continued to apply silently to all successor licenses.

The Pinchot/Lenroot/Jones amendment introduced for the first time words that were expressly concerned with successor licenses. As a result, the first 15 words were limited in their application to preliminary permits and *initial* licenses, and the 11 words that were added applied exclusively to successor licenses. The official explanation, per Senate Report No. 180 (66th Congress, 1st Session), described this amendment as one of a general body of amendments that were "of a minor character" and made "more clear and certain the meaning of the House provisions."

The interpretation of the public power interests and the Commission staff counsel that "new licensees" are any licensees under a successor license, is the *only* interpretation that is consistent with the official explanation. The words were added to express the same municipal preference with respect to successor licenses that was in Section 7 silently immediately before its amendment. The narrower interpretation of the private power interests that "new licensees" are limited to those not in possession, would have resulted in a substantive change and presumably would have been described as such in Senate Report No. 180. And the alternative justification of the private power interests that the amendment added a limited municipal preference on relicensing where none had existed before, also would have resulted in a substantive change and, additionally, runs counter to Merrill's memorandum of October 31, 1917, and other indicia of the existence of the preference.

Finally, the interpretation of the public power interests is consistent not only with the official explanation of the Pinchot/

Lenroot/Jones amendment, but also with the Merrill/Lee explanation of the FWPA as it emerged from the committee of conference and was passed by Congress and signed by President Wilson.

We turn, next, to the effects of interpreting "new licensees" one way or the other. Section 7(a) identifies three areas of potential competition for preliminary permits and licenses, as follows:

1. Preliminary permits
2. Initial licenses not associated with outstanding preliminary permits
3. Successor licenses

The three areas cover the entire possible field of competition with the exception of initial licenses associated with outstanding preliminary permits. That area was intentionally omitted because preliminary permits are issued for the sole purpose of maintaining priority of application for licenses, and because permittees are to receive such priority if any license is issued and if they comply with the terms of their permits.

Section 7(a) also describes two preferences, or standards, to be applied by the Commission in choosing among competing applicants in the foregoing three areas of competition. If the competitors are States or municipalities, the Commission is directed to give them preference over citizens and corporations if their plans are "equally well adapted". But "as between other applicants", or, stated another way, as among citizens and corporations *inter se* when the competitors are not States and municipalities, the Commission may give preference to the applicant with the "best adapted" plans.

The two preferences cover all of the possible combinations of competitors with the possible exception of competition among States and municipalities *inter se*. It could be argued that it was not necessary to cover such competition since the political process could be expected to resolve questions pertaining to the choice of the government entities that would develop water

power on behalf of the public.⁴⁷ But we believe that there is a silent prepositional phrase in the municipal preference, as follows:

. . . The Commission shall give preference to applications therefor by States and municipalities *over applications by citizens and corporations*. . . .

With the addition of that phrase, we construe the second preference "as between other applicants" to mean "as between applicants other than States and municipalities, on the one hand, and citizens and corporations, on the other hand". With that meaning, the second preference would be applicable to competition among States and municipalities *inter se*, as well as among citizens and corporations *inter se*. The first, or municipal, preference would continue to be applicable to competition between States or municipalities, and citizens or corporations, completing the coverage of all the possible combinations of competitors.

If "new licensees" are any licensees under a successor license, as the public power interests and the Commission staff counsel contend, the application of the two preferences to the three areas of competition will provide a standard for the Commission to apply in every possible permitting and licensing situation, with the exception of the one area of competition intentionally excluded. The Commission can apply either the "equally well adapted" or the "best adapted" standard to the issuance of all (a) preliminary permits, (b) initial licenses not associated with outstanding preliminary permits, and (c) successor licenses, depending upon whether any applicants are States or municipalities. And there will be no gaps in any situation, except as intended.

The private power interests' position, on the other hand, that "new licensees" exclude "original licensees", will produce absurd results as well as a regulatory gap.

⁴⁷ Whatever the expectation of Congress, we have experienced competitive licensings between States and municipalities *inter se*.

Counsel for the Hydro Group took the position in the oral argument (TR. 89-90) that under their view that "new licensees" exclude "original licensees", State and municipal "original licensees" *in possession* would not have a relicensing preference against citizen or corporation applicants *not in possession*. Since States and municipalities have an undisputed preference to preliminary permits and initial licenses, it is absurd to believe that Congress did not also give them a preference to successor licenses in those circumstances.

The private power interests also say that the municipal preference doesn't apply unless the "original licensee" in possession chooses not to file an application for a successor license—in which case a State or municipality not in possession could compete against a citizen or corporation not in possession, resulting in a routine application of the "equally well adapted" standard. It is even more absurd to believe that Congress gave States and municipalities *not in possession* a preference against citizens and corporations not in possession, without also giving States and municipalities *in possession* the same preference against citizens and corporations not in possession.

The private power interests say, additionally, that if the "original licensee" in possession *does* file an application for a successor license, the municipal preference doesn't apply until the Commission first decides not to issue a successor license to the "original licensee". The problems with that position are threefold.

First, a State or municipality not in possession would nonetheless be competing against the "original licensee" in possession within a two-step relicensing procedure, one step to decide whether to issue the successor license to the "original licensee" in possession, and if not, the other to choose among

applicants not in possession. There is in fact no such two-step procedure.⁴⁸

Second, competition between a citizen or corporation in possession and a State or municipality not in possession clearly is not covered by the second preference of Section 7(a).⁴⁹ If it is not also covered by the municipal preference, as the private power interests contend, then the Commission would have no standard to apply in deciding whether to issue a successor license to the "original licensee" in possession.

And third, a decision to issue a successor license to the "original licensee" in possession would, in effect, provide a relicensing preference for the "original licensee", contrary to the position of counsel for the Hydro Group in the oral argument. A relicensing preference in favor of an "original licensee" in possession is irreconcilable with the absence of statutory words or legislative history indicating that such a preference exists, and, particularly, with the private power interests' emphasis on the "plain meaning" of the statute.

⁴⁸ While the private power interests rely on the 1968 amendments to the FPA because of Chairman White's statement to Congress, the fact is that those amendments were enacted to eliminate a three-step relicensing/takeover procedure, and the resulting procedure described in the legislative history of those amendments does not indicate that there would be two steps in relicensing. Indeed, Section 14(b), which was enacted in 1968, states that,

the Commission shall entertain applications [plural] for a new license and decide them in a relicensing proceeding [singular] pursuant to the provisions of section 15. . . .

suggesting that all pending applications are to be decided at the same time.

⁴⁹ If the second preference said, "in other situations," it would have been a catch-all. But the words, "as between other applicants," refer back to the combinations of competitors (State/municipal v. citizen/corporation) covered by the municipal preference, as distinguished form [sic] the areas of competition (permits and licenses) to which both preferences are applied.

1968 Amendments

Having determined that the interpretation of the public power interests and the Commission staff counsel is supported by the legislative history, and that the interpretation of the private power interests produces absurd results and leaves a regulatory gap, we turn to the claim that Congress in 1968 precluded a subsequent change in the Commission's administrative interpretation favoring the private power interests.⁵⁰

The private power interests would have us invoke a judicially-created doctrine that was called the "doctrine of reenactment" in *Association of American Railroads v. Interstate Commerce Commission*, 564 F.2d 486 (D.C. Cir., 1977), at 493, a leading case that applied the doctrine. As its name implies, invocation of the doctrine requires a threshold reenactment of a statutory provision which, in this case, is Section 7(a) of the FPA. Although the first paragraph of Section 7 of the FWPA was reenacted in 1935 as Section 7(a) of the FPA, the private power interests do not base their claim on that reenactment and, in any event, the other requisites are not present with respect to that reenactment. They base their claim on the 1968 legislation amending Section 7 of the FPA to add Section 7 (c), but not reenacting Section 7(a).

⁵⁰ One of the most troublesome aspects of that interpretation, if not the most troublesome one, is that the General Counsel's rationale has not surfaced in this proceeding. As a result, we have no basis for judging the merits of, or being persuaded by, his interpretation, other than through the documents submitted to him, namely, (1) the legal memorandum transmitted to the General Counsel on behalf of some private power interests with the O'Kelly letter dated December 19, 1966, and (2) the Ely opinion letter to the American Public Power Association dated March 24, 1967. Copies of the foregoing documents were transmitted to the Commission as attachments to the Assistant General Counsel's memorandum dated March 28, 1967, which stated, simply, "our view of the correct interpretation of section 7(a) . . . is similar to that contained in the O'Kelly memorandum."

Under the "doctrine of reenactment", when Congress is made aware of an administrative interpretation of a statutory provision and gives an affirmative indication of an intent not to change the meaning of the provision, Congress thereby precludes a subsequent change in the administrative interpretation of that provision. In addition to the requisite reenactment, *Association of American Railroads* suggests, at 493, that the administrative interpretation should be a "longstanding and unquestioned interpretation" in the course of the work of an agency, which we would distinguish from an administrative interpretation recited to Congress at committee hearings. *Association of American Railroads* also suggests, at 493, not only that Congress must have expressed its satisfaction with the interpretation, but also must have "affirmatively concluded that it should not be changed for the time being".

Securities and Exchange Commission v. Sloan, 436 U.S. 103 (1978), is, perhaps, the most recent Supreme Court decision on the "doctrine of reenactment". The Securities and Exchange Commission (SEC) had authority under the Securities and Exchange Act of 1934 to summarily suspend the trading of securities on national exchanges for a period of 10 days, and it consistently interpreted its authority as permitting trading suspensions for successive 10-day periods, resulting in some long suspensions. In 1964 Congress amended the Securities Exchange Act of 1934 to grant the SEC the same power to summarily deal with securities traded in the over-the-counter market as it already had to deal with securities on national exchanges, and in 1975 Congress further amended that Act to consolidate the two resulting statutory provisions into one. The SEC informed Congress of its practice, in conjunction with the 1964 amendment, and the Senate Committee on Banking and Currency indicated in its report (Senate Report No. 379, 88th Congress, 1st Session) that it understood and did not disapprove the SEC's practice. Nonetheless, the Supreme Court struck down the practice and refused to apply

the "doctrine of reenactment", stating, at 120, that the SEC made its practice known to at least one committee

at a time when the attention of the committee and of the Congress was focused on issues [the expansion of powers over securities on national exchanges to securities traded over-the-counter] not directly related to the one presently before the Court. Although the section in question was re-enacted in 1964, and while it appears that the Committee Report did recognize and approve of the Commission's practice, this is scarcely the sort of congressional approval [that is required].

We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this.

On the basis of the foregoing two decisions, among others not cited, we conclude that the private power interests' position is deficient in at least the following respects, any one of which is cause for declining to invoke the "doctrine of reenactment": (1) There was no reenactment of Section 7(a) after the Commission made its interpretation known to the committee. (2) The committee and Congress in 1968 were focusing on the non-controversial proposed procedures interrelating relicensing and takeover, not directly related to the controversial matter of the municipal preference. (3) Congress, and particularly the House (as distinguished from the Senate committee), was not shown to have been *generally aware* in 1968 of the Commission's interpretation. (4) The Commission's 1968 interpretation was not and is not a long-standing work practice.⁵¹

⁵¹ The Commission's interpretation of the municipal preference in a relicensing contest is inherently incapable of being a long-standing work practice because, as indicated, (1) the vast majority of initial licenses were issued for 50-year periods and did not begin to expire until the 1970's, and (2) this declaratory order proceeding was initiated for the express purpose of determining what the work practice will be.

Their position is so materially deficient in so many respects that we believe that it is appropriately characterized as a "red herring".

THE MUNICIPAL PREFERENCE IN RELICENSING DECISIONS

Section 7(a) of the FPA contains the standards to be applied by the Commission in choosing between or among applicants who are competing for preliminary permits and licenses for the same water resources. One standard is the "municipal" preference, which applies to competition between States or municipalities, on the one hand, and citizens or corporations, on the other.⁵² If the Commission finds that the plans⁵³ of the State or municipality are "equally well adapted" as those of the citizen or corporation "to conserve and utilize in the public interest the water resources of the region", the Commission is directed by the statute to issue the preliminary permit or license to the State or municipality.

Several parties, including the staff counsel, interpret the municipal preference of Section 7(a) to be a tie-breaking concept. We agree. Simply put, for a preliminary permit or an

⁵² In the other, as between citizens and corporations, *inter se*, and States and municipalities, *inter se*, "the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans."

⁵³ The words "plan" and "plans" are used in several contexts in the FPA. The references in Section 7(a) to "equally well adapted" and "best adapted" "plans", as well as the reference in Section 10(a) to "comprehensive plan", run to the physical and nonphysical aspects of proposals for the development, conservation, and utilization of regional water resources. The references in Sections 9(a) and 10(a), on the other hand, to maps, "plans", and specifications, run more narrowly to the physical and technical drawings, plans and specifications of a project.

initial license, if the competing applications are equal with respect to advancing the public interest, the tie is broken by granting to the State or municipal applicant the statutory preference.⁵⁴ We have determined that this preference similarly holds in relicensing cases.

Congress intended that a State's or municipality's entitlement to preference should depend upon an evaluation by the Commission of public interest factors reflected in the competing plans before the Commission. As Congressmen Doremus and Raker said on the floor of the House (Dove, at 623-5):

MR. DOREMUS. You have got to leave the discretion to determine whether the plans are adequate to serve the public interest with somebody, and necessarily it must be with the commission created in the bill.

MR. RAKER. That being the case they should be allowed that discretion, and not be directed absolutely to grant the application.

MR. DOREMUS. They would still have the discretion to determine whether the plans submitted by the State or municipality were adapted to conserve [sic.] the public interests.

As discussed in previous sections, Congress envisioned probable private development of water power resources with ultimate public ownership possible.⁵⁵ The FWPA was enacted at a time when private interests were prepared to proceed to a much greater extent than the federal, State and local governments were, with financing and building hydropower projects.

⁵⁴ States and municipalities have a special opportunity under Section 7(a) to modify their plans to conform them to or make them better than any competing plans. Therefore, the municipal preference of Section 7(a) assures a State or municipality of being the successful applicant if it is able and willing to meet its competitors' plans on the merits. See 18 C.F.R. 433(g).

⁵⁵ Senate Report No. 180, 66th Congress, 1st Session, quoted on page [40a].

Congress concluded at the time the FWPA was passed that the public interest would best be served by rapid development of water power resources—by private or public entities—leaving the possibility of transfer of the hydro-facilities from private to public ownership at a later date should the Commission determine that the public interest could equally well be served by the public entities assuming ownership and the right to operate the facilities.

As early as 1908, President Roosevelt's landmark Rainy River veto message sought water power legislation that would leave "to future generations the power or authority to renew or extend the concession [license] in accordance with the conditions which may prevail at the time." And Merrill's memorandum of October 31, 1917, called for statutory "provisions that will leave the way open for future public ownership and operation if the experience of the next fifty years shall have established the wisdom of such a policy."

Merrill's proposal for a purely discretionary municipal preference⁵⁶ was modified in its movement through Congress into a preference that is mandatory should the Commission, in the exercise of its judgment, determine, in the words of Congressman Doremus, that "the plans are adequate *to serve the public interest*". (Emphasis added.)

Congress in 1920 was focusing on our nation's water power sites and equated the "public interest" with the prompt development of those sites. But Congress provided for the possibility of eventual public ownership even where the private interests undertook the responsibility for that development. This possibility was made dependent upon an evaluation by the Commission, at the time a license expires, of how the public interest would best be served by choosing among the various alternatives.

⁵⁶ See the first paragraph of Section 7 of the Administration Bill, quoted on page [33a-34a].

In sum, the Commission finds and hereby declares that the statutory scheme of the FPA is one in which a municipal or State applicant competing for a successor license against a citizen or corporate applicant is entitled by Section 7(a) to a preference if the Commission finds that the plans of the State or municipality are, in the words of Section 7(a),

equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region. . . .

Thus, in determining which competing applicant will receive a successor license, it is important to look not only at the "tie-breaker rule", but also to how the Commission will determine whether the plans are "equally well adapted". Put differently, whether there is a tie to be broken by municipal preference will depend upon the factors that the Commission takes into account to determine how well each of the competing plans would conserve and utilize the water resources of the region in the public interest.

The Commission does not have before it a record upon which a definitive statement can be made as to what showings should and must be made by the applicants in seeking to demonstrate how their plans compare. However, the record in this proceeding, the language of the statute itself, and the pertinent legislative history provide a basis for some generalizations about the public interest determination.

First, we believe the statute contemplates a broad assessment, evaluating both physical and nonphysical considerations when the public interest is assessed. Congress did not direct the Commission, in choosing among applicants, to limit its focus merely to plans in the physical or technical sense⁵⁷ to make beneficial public use of our nation's waterways. All

⁵⁷ See Footnote 53.

licensed water power projects are required by Section 10(a)⁵⁸ to be best adapted physically and technically to utilize our nation's water resources for the benefit of the public and, to the extent that they also conserve those resources, to do so for the benefit of the public. We are specifically authorized by Section 10(a) to require modifications to secure plans (in the physical or technical sense) that will be best adapted to a comprehensive plan (in the nonphysical as well as physical sense) for beneficial public uses. Thus, a project must be "best adapted", physically and technically, to beneficial public uses no matter which applicant we select.

During the oral argument, the Commission staff counsel suggested (Tr. 146) that our assessment of the "public interest" should be as broad as the commerce clause of the Constitution, and the general counsel of the American Public Power Association expressed his agreement (Tr. 187). Without adopting that particular interpretation here, we agree with the characterization expressed by the attorney for Utah Power and Light Company (Tr. 190) that our decision ought to take into account "the public interest in its broadest sense."

To evaluate the public benefits that would attend a relicensing, necessitates consideration of physical and technical factors as well as consideration of broader social impacts such as

⁵⁸ Section 10 provides, in pertinent part,

All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes; *and if necessary in order to secure such plan the Commission shall have the authority to require the modification of any project and of the plans and specifications of the project works before approval.* [Emphasis added.]

economic costs and benefits, the distribution of the benefits of hydropower and similar pertinent potential impacts. All of these would seem to play a role in the Commission's determination as to whether plans are equally well adapted.

Second, we believe that Congress did not intend the "public interest" to be static or frozen as of 1920. To the contrary, the legislative history of the FWPA shows that one of the reasons why Congress rejected perpetual licenses was to reserve for future generations the decisions as to which segments of the public would receive the benefits of our nation's water power resources. We believe that the "public interest" will vary with the circumstances and needs of the time period in which it is considered.

Third, public interest implications of competition in relicensing decisions can be even more complex and complicated than for initial licenses. When issuing *initial* licenses for unconstructed projects, we are permitting the utilization of then unused or underused water resources. Our choice between public and private applicants for *initial* licenses for unconstructed projects results in allocating the benefits of relatively inexpensive renewable sources of energy to either a segment of the public associated with the public applicant, or the private applicant or a segment of the public associated with it, none of whom are then receiving those benefits. But our choice between public and private applicants for *successor* licenses may result in *reallocating* the benefits of water power resources then in use from the private applicant, or a segment of the public associated with it, to the public entity and the segment of the public associated with the public entity. Moreover, transfer itself may have some effects, possibly disruptive, which are not present with initial licenses.

Fourth, our relicensing decisions may have important implications for the concentration and distribution of the benefits of hydropower, and it is important to keep in mind that FWPA was an outgrowth of a widespread belief—and an associated political movement—that had a basic tenet that the

benefits of hydropower should be spread widely. A basic goal of the FPA is to assure that hydropower benefits are enjoyed by as much of the public as possible.

As previously noted, it will be necessary to develop the information on which to decide whether Bountiful, Santa Clara and other municipalities are entitled to a preference, in competing for a successor license, and it is important that the Commission be provided with an adequate basis upon which to examine broad public interest considerations.

Parties are encouraged to address such additional areas of consideration as they contend are pertinent to our selection of licensees for particular successor licenses. We emphasize, in this connection, that the "public interest" standard of Section 7(a) has never been litigated in court and has been addressed in only a few Commission decisions.⁵⁹ It would, therefore, be premature to address the applicability, relevancy and materiality of particular areas of consideration. We would expect such factors to vary from case to case.

⁵⁹ Although it has never been disputed that the municipal preference is applicable to initial licensings, and although the Commission has been issuing initial water power licenses for almost 60 years, there are no court decisions and few Commission decisions on the "public interest" standard of Section 7(a). In *Holyoke Water Power Co., et al.*, Project Nos. 2004 and 2014, 8 FPC 471 (1949), wherein it was said, at 487, that the preference under Section 7(a) "is not an absolute one", a municipality that was unable and unwilling to meet its competitor's plans was denied an initial license. And in *Pacific Northwest Power Company*, Project Nos. 2243 and 2273, 31 FPC 247 (1964); affirmed *sub nom Washington Public Power Supply System v. Federal Power Commission*, 358 F.2d 840 (D.C. Cir. 1966); reversed on other grounds *sub nom Udall v. Federal Power Commission*, 387 U.S. 428 (1967), a Commission majority indicated by way of dictum, at 270, that after a hearing

. . . we would then determine if preference accrues to the [municipality], and the effect of such a preference, if any, in the light of all the other factors relevant to a disposition of these [competing licensing] applications. . . .

In the final analysis, it is left to the Commission to determine the "public interest" in the light of the facts and contentions in each particular application. The processing and consideration of the pending applications in which States and municipalities, and citizens or corporations, have requested successor licenses for the same water resources should go forward in the light of this declaratory order. Finally, the Commission's Opinion Nos. 36 and 36A (*Escondido Mutual Water Company, et al.*, Project No. 176), involving a successor license and discussed briefly in Footnote 10, are subject to a pending appeal.

By the Commission.

(S E A L)

/s/ Kenneth F. Plumb,
KENNETH F. PLUMB
Secretary

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 88-A
Docket No. EL78-43

CITY OF BOUNTIFUL, UTAH
UTAH POWER AND LIGHT COMPANY
CITY OF SANTA CLARA, CALIFORNIA
PACIFIC GAS AND ELECTRIC COMPANY

Issued: August 21, 1980

ORDER DENYING REHEARING

Before Commissioners: CHARLES B. CURTIS, Chairman;
GEORGIANA SHELTON, and GEORGE R. HALL.

On June 27, 1980, the Commission issued Opinion No. 88 in this proceeding for a declaratory order. There we determined that the preference in Section 7(a) of the Federal Power Act for states and municipalities is applicable against a non-state, non-municipal original licensee in a competitive relicensing proceeding, if the state or municipal applicant's plans are "equally well adapted to conserve and utilize in the public interest the water resources of the region."¹ The members of the Hydroelectric Utility Company Group,² Carolina Power and Light Company, Montana Power Company, Pacific Gas and Electric Company, Utah Power and Light Company, and Wisconsin Power and Light Company have filed applications for rehearing urging us to vacate our order and reverse our determination. The "Public Power Parties", comprising the Cities of Santa Clara, California, and Bountiful, Utah, the Clark-Cowlitz Joint Operating Agency, and the American Public Power Association, have jointly filed an application for rehearing requesting that we delete from Opinion No. 88 the explication of the public interest standard that we must apply

¹ 16 U.S.C. § 800(a) (1976).

² See Opinion No. 88 (issued June 27, 1980) (*mimeo* at [22a] n.14).

to decide, in any particular relicensing proceeding, whether a state's or municipality's plans are "equally well adapted".

The private power interests do not raise any new theories in their applications for rehearing. They argue in more detail about the background and legislative history of the Federal Water Power Act. The Commission has reviewed the arguments of the parties on the meaning of the legislative history as those arguments have been made initially and expanded upon in the various applications for rehearing.

As we indicated in Opinion No. 88, nothing in either the intrinsic or the extrinsic evidence on the meaning of Section 7(a) is clearly dispositive of the question before the Commission. The Commission has, in Opinion No. 88, attempted to give full effect to the general purpose of Section 7(a), in the context of Part I of the Federal Power Act, and reflected then on the lengthy and occasionally opaque legislative history. Nothing in the most recent arguments persuades us that we should reverse our determination made in Opinion No. 88.

In light of all of the available evidence of the legislative intent, we concluded that the interpretation more consistent with the purposes of the statute is that the state/municipal preference is applicable against a "private" original licensee in relicensing competitions if the state's or municipality's plans are "equally well adapted", and we are not persuaded to change that conclusion. In addition, we find no merit in the rehearing application of the "Public Power Parties." Accordingly, we shall deny rehearing.

The Commission Orders:

The applications for rehearing submitted in this Docket No. EL78-43 are denied.

By the Commission. Chairman Curtis voted present.

(S E A L)

/s/ KENNETH F. PLUMB
Kenneth F. Plumb,
Secretary

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 80-7461

D.C. Docket No.
EL 78-43, ER 78-43
88 (80-2083 & 80-2275 Consol. in D.C.)
(80-1865 & 80-1871 Consol. in D.C.)

ALABAMA POWER COMPANY, UTAH POWER & LIGHT COMPANY,
PACIFIC GAS & ELECTRIC COMPANY, THE MONTANA POWER COM-
PANY, WISCONSIN POWER & LIGHT COMPANY, and PACIFIC POW-
ER & LIGHT COMPANY,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petitions For Review Of An Order Of The Federal Energy Regulatory Commission

Before RONEY, TJOFLAT and HATCHETT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petitions of Alabama Power Company, Utah Power & Light Company, Pacific Gas & Electric Company, the Montana Power Company, Wisconsin Power Company and Pacific Power & Light Company for review of an order of the Federal Energy Regulatory Commission, and was argued by counsel;

82a

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Federal Energy Regulatory Commission is AFFIRMED.

September 17, 1982

ISSUED AS MANDATE: DEC 06 1982

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7641.

ALABAMA POWER COMPANY, *et al.*, *Petitioners*,
versus
FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*.

United States Court of Appeals
Eleventh Circuit

FILED
NOV. 12, 1982

NORMAN E. ZOLLER
CLERK

Petition For Review Of An Order Of The Federal Energy
Regulatory Commission

ON PETITION FOR REHEARING AND SUGGESTION FOR
REHEARING EN BANC

(Opinion September 17, 1982, 11 Cir., 198__, __ F.2d ____).

(November 12, 1982)

Before RONEY, TJOFLAT and HATCHETT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh

Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

PARTIES

The following were parties to the proceeding in the court whose judgment is sought to be reviewed:

PETITIONERS

Alabama Power Company, Inc.
The Montana Power Company
Pacific Gas & Electric Company
Pacific Power & Light Company
Utah Power & Light Company
Wisconsin Power and Light Company

INTERVENORS IN SUPPORT OF PETITIONERS

Appalachian Power Company
Arkansas Power & Light Company
Baltimore Gas & Electric Company
Carolina Power & Light Company
Central Maine Power Company
Connecticut Light & Power Company
Duke Power Company
Georgia Power Company
Hartford Electric Company
Holyoke Water Power Company
Idaho Power Company
Jersey Central Power & Light Co.
Louisville Gas & Electric Company
Minnesota Power & Light Company
New England Power Company
New York State Electric & Gas Co.
Niagara Mohawk Power Corp.
Northern States Power Company
Pennsylvania Electric Company
Pennsylvania Power & Light Co.
Portland General Electric Co.
Public Service Company of Indiana
Public Service Electric & Gas Co.
Puget Sound Power & Light Co.

South Carolina Electric & Gas Co.
 Southern California Edison Co.
 Union Electric Company
 Virginia Electric & Power Co.
 Washington Water Power Co.
 Western Massachusetts Electric Co.
 Wisconsin Electric Power Co.
 York Haven Power Company

RESPONDENT

Federal Energy Regulatory Commission

INTERVENORS IN SUPPORT OF RESPONDENT

American Public Power Association
 City of Bountiful, Utah
 City of Santa Clara, California
 Clark-Cowlitz Joint Operating Agency, Washington

PARENTS, SUBSIDIARIES AND AFFILIATES OF PETITIONERS

Petitioner Utah Power & Light Company has no parent, subsidiaries or affiliates. Petitioner The Montana Power Company has no parent; the company operates several wholly owned subsidiaries, and is a stockholder of Pacific Northwest Power Company. This information is submitted pursuant to Rule 28.1 of this Court's rules.

The Federal Water Power Act, Ch. 285, 41 Stat. 1063 (1920)**EXCERPTS**

SEC. 3. That the words defined in this section shall have the following meanings for the purposes of this Act, to wit:

"Public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public-land laws. It shall not include "reservations," as hereinafter defined.

"Reservations" means national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public-land laws; also lands and interests in lands acquired and held for any public purpose.

"Corporation" means a corporation organized under the laws of any State or of the United States empowered to develop, transmit, distribute, sell, lease, or utilize power in addition to such other powers as it may possess, and authorized to transact in the State or States in which its project is located all business necessary to effect the purposes of a license under this Act. It shall not include "municipalities" as hereinafter defined.

"State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

"Municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.

"Navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition, notwithstanding interruptions between the navigable parts of such streams or waters by falls, shal-

lows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids; together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.

"Municipal purposes" means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality.

"Government dam" means a dam or other work, constructed or owned by the United States for Government purposes, with or without contribution from others.

"Project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights of way, ditches, dams, reservoirs, lands, or interest in lands, the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.

"Project works" means the physical structures of a project.

"Net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission," plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair

return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, in so far as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall in so far as applicable be published and promulgated as a part of the rules and regulations of the commission.

SEC. 4. That the commission is hereby authorized and empowered—

(a) To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the commission may deem necessary or useful for the purposes of this Act.

In order to aid the commission in determining the net investment of a licensee in any project, the licensee shall, upon oath, within a reasonable period of time, to be fixed by the commission, after the construction of the original project or any addition thereto or betterment thereof, file with the commission, in such detail as the commission may require, a statement in duplicate showing the actual legitimate cost of construction of such project, addition, or betterment, and the price paid for water rights, rights of way, lands, or interest in lands. The commission shall deposit one of said statements with the Secretary of the Treasury. The licensee shall grant to the commission or to its duly authorized agent or agents, at all reasonable

times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto.

(b) To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the commission, to furnish such records, papers, and information in their possession as may be requested by the commission, and temporarily to detail to the commission such officers or experts as may be necessary in such investigations.

(c) To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The commission, on or before the first Monday in December of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this Act, and in each case the parties thereto, the terms prescribed, and the moneys received, if any, on account thereof.

(d) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State, or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the

license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or [sic] foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided further*, That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to the passage of this Act: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (e) of this section, notice shall be given and published as required by the proviso of said subsection.

(e) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof: *Provided, however*, That upon the filing of any application for a preliminary permit by any person, association, or corporation the commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also

publish notice of such application for eight weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated.

(f) To prescribe rules and regulations for the establishment of a system of accounts and for the maintenance thereof by licensees hereunder; to examine all books and accounts of such licensees at any time; to require them to submit at such time or times as the commission may require statements and reports, including full information as to assets and liabilities, capitalization, net investment and reduction thereof, gross receipts, interest due and paid, depreciation and other reserves, cost of project, cost of maintenance and operation of the project, cost of renewals and replacements of the project works, and as to depreciation of the project works and as to production, transmission, use and sale of power; also to require any licensee to make adequate provision for currently determining said costs and other facts. All such statements and reports shall be made upon oath, unless otherwise specified, and in such form and on such blanks as the commission may require. Any person who, for the purpose of deceiving, makes or causes to be made any false entry in the books or the accounts of such licensee, and any person who, for the purpose of deceiving, makes or causes to be made any false statement or report in response to a request or order or direction from the commission for the statements and report herein referred to shall, upon conviction, be fined not more than \$2,000 or imprisoned not more than five years, or both.

(g) To hold hearings and to order testimony to be taken by deposition at any designated place in connection with the application for any permit or license, or the regulation of rates, service, or securities, or the making of any investigation, as provided in this Act; and to require by subpoena, signed by any member of the commission, the attendance and testimony of witnesses and the production of documentary evidence from any place in the United States, and in case of disobedience to a subpoena the commission may invoke the aid of any court of the

United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any member, expert, or examiner of the commission may, when duly designated by the commission for such purposes, administer oaths and affirmations, examine witnesses and receive evidence. Depositions may be taken before any person designated by the commission or by its executive secretary and empowered to administer oaths, shall be reduced to writing by such person or under his direction, and subscribed by the deponent. Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(h) To perform any and all acts, to make such rules and regulations, and to issue such orders not inconsistent with this Act as may be necessary and proper for the purpose of carrying out the provisions of this Act.

SEC. 5. That each preliminary permit issued under this Act shall be for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained and a license issued. Such permits shall not be transferable, and may be canceled by order of the commission upon failure of permittees to comply with the conditions thereof.

SEC. 6. That licenses under this Act shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the commission shall prescribe in conformity with this Act,

which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the commission after ninety days' public notice.

SEC. 7. That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted, or shall within a reasonable time to be fixed by the commission be made equally well adapted, to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

That whenever, in the judgment of the commission, the development of any project should be undertaken by the United States itself, the commission shall not approve any application for such project by any citizen, association, corporation, State, or municipality, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the project as it may deem necessary, and shall submit its findings to Congress with such recommendations as it may deem appropriate concerning the construction of such project or completion of any project upon any Government dam by the United States.

The commission is hereby authorized and directed to investigate and, on or before the 1st day of January, 1921, report to Congress the cost and, in detail, the economic value of the power plant outlined in project numbered 3, House Document numbered 1400, Sixty-second Congress, third session, in view

of existing conditions, utilizing such study as may heretofore have been made by any department of the Government; also in connection with such project to submit plans and estimates of cost necessary to secure an increased and adequate water supply for the District of Columbia. For this purpose the sum of \$25,000, or so much thereof as may be necessary, is hereby appropriated.

SEC. 8. That no voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee hereunder: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

* * *

SEC. 10. That all licenses issued under this Act shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the commission will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses; and if necessary in order to secure such scheme the commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of a capacity in excess of one hundred horsepower without the prior approval of the commis-

sion; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the commission may direct.

(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

(d) That after the first twenty years of operation out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the actual, legitimate investment of a licensee in any project or projects under license the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license.

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission for the purpose of reimbursing the United States for the costs of the administration of this Act; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective states shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein pro-

vided is reached, and in fixing such charges the commission shall seek to avoid increasing the price to the consumers of power by such charges, and charges for the expropriation of excessive profits may be adjusted from time to time by the commission as conditions may require: *Provided*, that when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license: *Provided*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than one hundred horsepower capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the commission.

(f) That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other head-water improvement, the commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the commission.

Whenever such reservoir or other improvement is constructed by the United States the commission shall assess similar charges against any license directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 17 hereof.

(g) Such further conditions not inconsistent with the provisions of this Act as the commission may require.

(h) That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

(i) In issuing licenses for a minor part only of a complete project, or for a complete project of not more than one hundred horsepower capacity, the commission may in its discretion waive such conditions, provisions, and reimbursements of this Act, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: *Provided*, That the provisions hereof shall not apply to lands within Indian reservations.

* * *

SEC. 14. That upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to

property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by agreement between the commission and the licensee, and in case they can not agree, by proceedings in equity instituted by the United States in the district court of the United States in the district within which any such property may be located: *Provided*, That such net investment shall not include or be affected by the value of any lands, rights of way, or other property of the United States licensed by the commission under this Act, by the license, or by good will, going value, or prospective revenues: *Provided further*, That the values allowed for water rights, rights of way, lands, or interest in lands shall not be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

SEC. 15. That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new

licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

* * *

SEC. 22. That whenever the public interest requires or justifies the execution by the licensee of contracts for the sale and delivery of power for periods extending beyond the date of termination of the license, such contracts may be entered into upon the joint approval of the commission and of the public-service commission or other similar authority in the State in which the sale or delivery of power is made, or if sold or delivered in a State which has no such public-service commission, then upon the approval of the commission, and thereafter, in the event of failure to issue a new license to the original licensee at the termination of the license, the United States or the new licensee, as the case may be, shall assume and fulfill all such contracts.

**Part I Of The Federal Power Act, As Amended, 16 U.S.C.
§§ 791-823a (1976) (Excerpts)**

§ 796. Definitions [FPA § 3 as amended]

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include "reservations", as hereinafter defined;

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

(3) "corporation" means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined;

(4) "person" means an individual or a corporation;

(5) "licensee" means any person, State, or municipality licensed under the provisions of section 797 of this title, and any assignee or successor in interest thereof;

(6) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign

nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been recommended to Congress for such improvement after investigation under its authority;

(9) "municipal purposes" means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

(10) "Government dam" means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or fore-bay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) "project works" means the physical structures of a project;

(13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such

investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission;

(14) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively;

(15) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;

(16) "security" means any note, stock, treasury stock, bond, debenture, or other evidence of interest in or indebtedness of a corporation subject to the provisions of this chapter.

§ 797. General powers of Commission [FPA § 4 as amended]

The Commission is authorized and empowered—

(a) Investigations and data

To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the commission may deem necessary or useful for the purposes of this chapter.

(b) Statements as to investment of licenses in projects; access to projects, maps, etc.

To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) Cooperation with executive departments; information and aid furnished commission

To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the commission, to furnish such records, papers, and information in their possession as may be requested by the commission, and temporarily to detail to the commission such officers or experts as may be necessary in such investigations.

(d) Publication of information, etc.; reports to Congress

To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted

for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this subchapter, and in each case the parties thereto, the terms prescribed, and the moneys received if any, or account thereof. Such report shall contain the names and show the compensation of the persons employed by the Commission.

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the

Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided further*, That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

(f) Preliminary permits; notice of application

To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however*, That upon the filing of any application for a preliminary permit by any person, association, or corporation the commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part hereof or the lands affected thereby are situated.

(g) Investigation of occupancy for developing power; orders

Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of

developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

§ 798. Purpose and scope of preliminary permits; transfer and cancellation [FPA § 5 as amended]

Each preliminary permit issued under this subchapter shall be for the sole purpose of maintaining priority of application for a license under the terms of this chapter for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained. Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing.

§ 799. License; duration, conditions, revocation, alteration, or surrender [FPA § 6 as amended]

Licenses under this subchapter shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of this subchapter and

calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of title 41.

§ 800. Issuance of preliminary permits or licenses [FPA § 7 as amended]

(a) Preference

In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Development of water resources by United States; reports

Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

(c) Assumption of project by United States after expiration of license

Whenever, after notice and opportunity for hearing, the Commission determines that the United States should exercise its right upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.

§ 801. Transfer of license; obligations of transferee [FPA § 8 as amended]

No voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this chapter to the same extent as though such successor or assign were the original licensee under this chapter: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

§ 803. Conditions of license generally [FPA § 10 as amended]

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans, etc., to secure adaptability of project

That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or

benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(b) Alterations in project works

That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.

(c) Maintenance and repair of project works; liability of licensee for damages

That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain, and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license and in no event shall the United States be liable therefor.

(d) Amortization reserves

That after the first twenty years of operation, out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the Commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license. For any new license issued under section 808 of this title, the amortization reserves under this subsection shall be maintained on and after the effective date of such new license.

(e) Annual charges payable by licensees

That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission for the purpose of reimbursing the United States for the costs of the administration of this subchapter; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the Commission shall seek to avoid increasing the price to the consumers of power by such charges, and any such charges may be adjusted from time to time by the Commission as conditions may require: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of title 25, fix a reason-

able annual charge for the use thereof, and such charges may with like approval be readjusted by the Commission at the end of twenty years after the project is available for service and at periods of not less than ten years thereafter upon notice and opportunity for hearing: *Provided further*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation, licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than two thousand horsepower installed capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the Commission. In the event an overpayment of any charge due under this section shall be made by a licensee, the Commission is authorized to allow a credit for such overpayment when charges are due for any subsequent period.

(f) Reimbursement by licensee of other licenses, etc.

That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the Commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the Commission. The licensees or permittees

affected shall pay to the United States the cost of making such determination as fixed by the Commission.

Whenever such reservoir or other improvement is constructed by the United States the Commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 810 of this title.

Whenever any power project not under license is benefited by the construction work of a licensee or permittee, the United States or any agency thereof, the Commission, after notice to the owner or owners of such unlicensed project, shall determine and fix a reasonable and equitable annual charge to be paid to the licensee or permittee on account of such benefits, or to the United States if it be the owner of such headwater improvement.

(g) Conditions in discretion of commission

Such other conditions not inconsistent with the provisions of this chapter as the commission may require.

(h) Monopolistic combinations prohibited

Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

(i) Waiver of conditions

In issuing licenses for a minor part only of a complete project of not more than two thousand horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of this subchapter, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: *Provided*, That the provisions hereof shall not apply to annual charges for use of lands within Indian reservations.

§ 807. Right of Government to take over project works [FPA § 14 as amended]

(a) Compensation; condemnation by Federal or State Government

Upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 796 of this title, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this chapter, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter

at any time by condemnation proceedings upon payment of just compensation is expressly reserved.

(b) Time of applications for new licenses; relicensing proceedings; Federal agency recommendations of take over by Government; stay of orders for new licenses; termination of stay; notice to Congress

No earlier than five years before the expiration of any license, the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 808 of this title. In any relicensing proceeding before the Commission any Federal department or agency may timely recommend, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if its¹ does not itself recommend such action pursuant to the provisions of section 800(c) of this title, shall upon motion of such department or agency stay the effective date of any order issuing a license, except an order issuing an annual license in accordance with the proviso of section 808(a) of this title, for two years after the date of issuance of such order, after which period the stay shall terminate, unless terminated earlier upon motion of the department or agency requesting the stay or by action of Congress. The Commission shall notify the Congress of any stay granted pursuant to this subsection.

§ 808. New licenses and renewals; compensation of old licensee; licenses for nonpower use; recordkeeping [FPA § 15 as amended]

(a) If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms

¹ So in original. Probably should read "it".

and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

(b) In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued to a new licensee only on the conditions that the new licensee shall, before taking possession of the facilities encompassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 807 of this title. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provisions of subchapter IV of this chapter, every licensee for nonpower use shall keep such accounts and file such annual and other periodic or special reports concerning the removal, alteration, nonpower use, or

other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate.

§ 815. Contract to furnish power extending beyond period of license; obligations of new licensee [FPA § 22]

Whenever the public interest requires or justifies the execution by the licensee of contracts for the sale and delivery of power for periods extending beyond the date of termination of the license, such contracts may be entered into upon the joint approval of the commission and of the public-service commission or other similar authority in the State in which the sale or delivery of power is made, or if sold or delivered in a State which has no such public-service commission, then upon the approval of the commission, and thereafter, in the event of failure to issue a new license to the original licensee at the termination of the license, the United States or the new licensee, as the case may be, shall assume and fulfill all such contracts.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Georgiana Sheldon, Acting
Chairman;
Matthew Holden, Jr., and
George R. Hall.

City of Bountiful, Utah)	
Utah Power and Light Company)	Docket No. EL78-43
City of Santa Clara, California)	
Pacific Gas and Electric Company)	

**ORDER GRANTING INTERVENTIONS AND
SETTING BRIEFING SCHEDULE
(Issued May 3, 1979)**

The City of Bountiful, Utah (Bountiful) and the City of Santa Clara, California (Santa Clara) have filed petitions for a declaratory order determining that the preference provided under section 7(a) of the Federal Power Act¹ (Act) for a "municipality" within the meaning of section 3(7)² applies against a non-public "original licensee" in a relicensing proceeding under section 15.³ Santa Clara's petition also raises the question of whether a present licensee who holds the license as an assignee or successor in interest⁴ is considered an "original licensee" under section 15. The petitions have been consolidated in a single docket and notice has been issued.

¹ 16 U.S.C. § 800(a) (1976).

² 16 U.S.C. § 796(7) (1976). Of course, if the preference does apply for a "municipality", it also applies for a state. *See* section 7(a) of the Act.

³ 16 U.S.C. § 808(a) (1976).

⁴ *See* section 8 of the Act, 16 U.S.C. § 801 (1976).

Related Motions

Clark-Cowlitz Joint Operating Agency (CCJOA) has filed an application for license in competition with an application by Pacific Power & Light Co. (PP&L) for relicensing of its Merwin Project No. 935. CCJOA has petitioned for an order declaring that it is the preferred applicant for relicensing of the Merwin Project. In addition, CCJOA has petitioned to intervene in this docket and has moved that we consolidate its petition for declaratory order with this proceeding. PP&L, on the other hand, has filed motions seeking to postpone action in Docket No. EL78-43 indefinitely, pending resolution in the relicensing proceeding, after evidentiary hearings, of whether CCJOA has a preference over PP&L. Both PP&L's and CCJOA's pleadings seek relief that would go beyond the scope of the instant proceeding.

In this docket, we are faced with resolution of a purely legal issue, a question of statutory construction which in no way hinges upon the facts of a particular case. In this proceeding, we are not concerned with whether any particular applicant is a "municipality"; nor are we addressing whether any particular applicant's plans are (or within a reasonable time are made) as well adapted as another's are to "conserve and utilize in the public interest the water resources of the region." Those are the kinds of questions implicit in the pleadings of CCJOA and PP&L.

Our inquiry here is solely—assuming a particular competing applicant on relicensing is a "municipality", and assuming its plans are or are made equally well adapted as those of a non-municipal "original licensee"—whether that municipality has a preference over that non-municipality. This is the sort of generic issue, with potential effects on a broad range of persons and proceedings, which is particularly well-suited to decision in a proceeding for a declaratory order. Even if we should decide here that the section 7(a) preference does apply against an "original licensee" in relicensing proceedings, that determination would not foreclose either CCJOA or PP&L from addressing in the proceeding for relicensing of the Merwin Project the particular circumstances of CCJOA, PP&L,

and the Merwin Project, and whether CCJOA would be entitled to such a preference. Those are matters which may well involve material factual disputes between CCJOA and PP&L and which, in any event, would not aid our determination of the issue of law before us in this docket. For this reason, we will deny the motions of both CCJOA and PP&L. Each will have the opportunity to present its arguments on the legal question in this proceeding as an intervenor. In addition—assuming for the sake of argument that we decide the section 7(a) preference applies in relicensing cases—CCJOA and PP&L may litigate in the relicensing proceeding on the Merwin Project the separate, specific question of whether CCJOA is entitled to such a preference.⁵

Interventions

In addition to CCJOA and PP&L, the following entities have petitioned to intervene in this proceeding: the American Public Power Association, Carolina Power & Light Co., Georgia Power Co., the "Hydroelectric Utility Company Group" (an informal collection of 31 investor-owned electric utility companies that are licensees or hold interests in licensees), the International Brotherhood of Electrical Workers, The Montana Power Co., Pacific Gas & Electric Co., Utah Power & Light Co., and Wisconsin Power & Light Co.⁶ The California Public Utilities Commission filed a notice of intervention. All have shown adequate reasons to be permitted to intervene.

⁵ We note also that this proceeding will not resolve whether either Bountiful or Santa Clara would be entitled to a section 7(a) preference, if there is one. Those issues must be resolved in the two separate relicensing proceedings in which they are respectively parties.

⁶ Although Santa Clara also has petitioned to intervene, it is already a party, since it filed one of the petitions that initiated this proceeding.

Briefing and Schedules

The primary issue in this proceeding is whether the section 7(a) preference for states and municipalities applies against a non-public "original licensee" in a relicensing proceeding. The secondary issue is whether a licensee holding its license as an assignee or successor in interest of an earlier licensee constitutes an "original licensee" under section 15. These questions are solely matters of law, not fact, and thus do not require an evidentiary hearing. Accordingly, the issues will be resolved after receiving briefs from the parties. We will allow 60 days for initial briefs. (Parties who have already filed their legal arguments need not refile.) Reply briefs will be due 30 days later.

The Commission orders:

(A) The following entities are permitted to intervene in this proceeding, subject to the Commission's rules and regulations under the Federal Power Act: the American Public Power Association; the California Public Utilities Commission; Carolina Power & Light Co.; Clark-Cowlitz Joint Operating Agency; Georgia Power Co.; the Hydroelectric Utility Company Group; the International Brotherhood of Electrical Workers; The Montana Power Co.; Pacific Gas & Electric Co.; Pacific Power & Light Co.; Utah Power & Light Co.; and Wisconsin Power & Light Co. Participation of the intervenors shall be limited to matters affecting asserted rights and interests specifically set forth in their petitions to intervene. The admission of the intervenors shall not be construed as recognition by the Commission that they might be aggrieved by any order entered in this proceeding.

(B) The parties to this proceeding and Commission staff counsel may file initial briefs no later than 60 days from the date of this order, and reply briefs no later than 30 days from the last day for filing initial briefs, addressing these issues:

- (1) Does the preference provided in section 7(a) of the Act for a state or a municipality apply in a relicensing

original licensee that is neither a state nor a municipality?

- (2) Is a licensee which holds the original license for a project as an assignee or a successor under section 8 of the Act an "original licensee" within the meaning of section 15 of the Act?

(C) The motion filed by Clark-Cowlitz Joint Operating Agency to consolidate with this proceeding the question of whether it has a preference over Pacific Power & Light Co. for relicensing of the Merwin Project is denied. The motion of Pacific Power & Light Co. to postpone action in this proceeding is denied.

By the Commission.

(S E A L)

Lois D. Cashell,
Acting Secretary.

**Proceedings Currently Before the FERC Which Raise The
Municipal Preference Question¹**

Project Name River (State)	Original, Private Licensee	Municipal Applicant(s)
Mokelumne Mokelumne River (California)	Pacific Gas & Electric	City of Santa Clara
Olmstead Provo River (Utah)	Utah Power & Light	(1) City of Bountiful (2) Utah Municipal Power Agency
Cresta N. Fork Feather River (California)	Pacific Gas & Electric	(1) Sacramento Municipal Utility Dist. (SMUD) (2) Northern Calif. Power Dist.
Merwin Lewis River (Washington)	Pacific Power & Light	Clark-Cowlitz
Weber Weber River (Utah)	Utah Power & Light	City of Bountiful

**Proceedings Currently Before the FERC Which Raise The
Municipal Preference Question¹**

Phoenix
Stanislaus River
(California)

Pacific Gas & Electric

Tuolumne Water
District

Shawano
Wolf River
(Wisconsin)

Wisconsin Power &
Light

City of Shawano

Haas Kings River
Kings River
(California)

Pacific Gas & Electric

SMUD

¹ Based on information provided by Commission staff.

**Excerpts From 59 Congressional Record (1920) (Emphasis
Supplied)**

Senate—January 5

[. . . p. 1044]

Mr. LENROOT. It is a perpetual license unless the property is taken over and paid for.

Mr. WALSH of Montana. Or unless another license is given to some one else.

Mr. LENROOT. Then it must be taken over and paid for.

Mr. WALSH of Montana. Of course; by the *new licensee*. Of course, some provision should be made for the case of the expiration of a license when the Government does not desire to take it over and no one else wants a new license. That condition should be taken care of, and some provision should be made for it.

Mr. LENROOT. If the proviso of the Senate committee amendment is adopted it will then require the tender of a new license to be made to the original licensee, and if the tender is not made he will be entitled to a license from year to year under the original license grant. There is more than a mere matter of form in connection with this. Why should not the Government be free in this regard? The Government ought to be free at the end of the 50-year term to deal in a given case according as the circumstances of that case may exist at the end of 50 years. Fifty years is a long time.

Mr. WALSH of Montana. Mr. President—

The PRESIDING OFFICER. Does the Senator from Wisconsin yield further to the Senator from Montana?

Mr. LENROOT. Certainly.

Mr. WALSH of Montana. Why should not the commission be required at the expiration of the period to tender? That would solve the situation. Why should it be left to their option to tender a new lease?

Mr. LENROOT. That is the effect, because they are entitled to an annual license, unless they do tender a new one. There is no objection to that. That would bring the tender of a new license, of course, but the difficulty is that the licensee may refuse to accept it, and of course he will refuse to accept it in every instance where the terms of the new license are less liberal than the terms of the original license.

Mr. WALSH of Montana. That, of course, is quite obvious.

Mr. LENROOT. The only case under the language of the proposed amendment where the licensee would accept the new license is where the new license was against the public interest and in his favor more than the original license.

Mr. WALSH of Montana. Let me inquire of the Senator whether that is exactly right? A license is tendered to him by the commission very much more onerous than the original license, and he declines to accept it. Under the proposed amendment he would be entitled to a lease only from year to year, but it would be subject to be let to a *new licensee* at any time. So if he desired to continue the business, in order to insure the continuance of the business in his hands, he might be quite willing to accept one very much more onerous in its terms than the original license, recognizing that new bidders would come in at [1045] the end of the year, or sooner, and possibly take the property on the terms offered to him. So it does not seem to me that he would necessarily decline to accept, even though the terms were more onerous than the original lease.

Mr. LENROOT. Mr. President, he would decline to accept for the reason that the *new licensee* could not get the property on paying the net investment to the original licensee for anything like its worth to him, because there are provisions in the bill which require him, in addition to paying the value of the property, to pay the original licensee what are known as severance damages.

Mr. WALSH of Montana. Of course, that is an entirely different feature of the bill.

Mr. LENROOT. It is a different feature of the bill, but it goes to the fact that the provision for a *new licensee* is no protection to the public in so far as compelling the original licensee to accept a new license tendered by the Government is concerned.

Mr. WALSH of Montana. Of course, that is another feature of the bill that we shall have to take up as an independent proposition when we get to it.

Mr. LENROOT. But it has a direct bearing upon this, because it destroys the Senator's argument that it is a protection to the public because a *new licensee* must take over the property at any time at exactly the net investment.

Mr. WALSH of Montana. The Senator from Montana has been making no argument. I have not had the benefit of the consideration of this matter by the committee as has the Senator from Wisconsin; I am very desirous of having a proper bill enacted; and I was endeavoring to elicit information and to ascertain how the Senator's statement that this amounts to a perpetual license is exactly correct. It did not occur to me that it was.

Mr. LENROOT. That is a perpetual license I think the Senator will agree with me.

Mr. WALSH of Montana. The Senator from Montana will rely upon the Senator from Wisconsin with entire confidence in any effort he may make to fix a period for the licenses at not more than 50 years.

Mr. LENROOT. It can be done by refusing to adopt the Senate committee amendment inserting the words "which is accepted" and adopting the amendment inserting the word "tender" instead of "issue," which will make it very clear that it will be a 50-year license and that at the end of the 50 years a new license must be tendered or the property must be turned over either to the Government or to a *new licensee* or else the original licensee will be entitled to an annual lease until one of those three things is done. That I am in favor of.

Mr. NUGENT. Mr. President—

The PRESIDING OFFICER. Does the Senator from Wisconsin yield to the Senator from Idaho?

Mr. LENROOT. I yield.

Mr. NUGENT. I will say that I am in entire accord with the views expressed by the Senator from Wisconsin [Mr. LENROOT] in respect to the effect of the proviso contained in section 15 of the bill; but I desire to call the Senator's attention to what I believe to be the fact, that there is a direct contradiction as between the provision of the body of the section and that contained in the proviso. In the body of the section it is provided that—

The commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations.

Under the proviso it is simply required that in the event the original licensee is not tendered a new license upon such reasonable terms as may be agreeable to him, then the commission shall issue to him under the original terms a license from year to year, utterly regardless of what the law may be at that time.

Mr. LENROOT. Exactly; and that was the next matter I was coming to in the discussion—the inclusion of the word “reasonable” in the amendment. Congress by the enactment of this proposed law would confer jurisdiction upon the courts not alone to determine the constitutionality of the law but to determine the reasonableness of the law itself—something that is entirely unprecedented in legislation; something that I do not think any Senator has ever before heard of in legislation.

The body of the section, as the Senator from Idaho [Mr. NUGENT] states, provides that “the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations.” Then, in the proviso, it is

provided, in effect, that those laws and regulations must be reasonable; and it would give the courts the power to set aside a law of the Congress of the United States, not because it was unconstitutional but because, in the opinion of the court, it was unreasonable. So much for that.

Mr. CHAMBERLAIN. Before the Senator from Wisconsin passes from that, will he not indicate to the Senate just what changes he would make in the proviso in order to make it conform to his view?

Mr. LENROOT. Yes. I would adopt the committee amendment striking out the word "issue," in line 18, and inserting the word "tender," and refuse to agree to the Senate committee amendment in line 19, inserting the words "on reasonable terms," and the amendment in line 20, inserting the words "which is accepted," so that the proviso would read as follows:

Provided, That in the event the United States does not exercise the right to take over or does not tender a new license to the original or a new licensee, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

Mr. WALSH of Montana. Should not the word "issue" remain as applied to the *new licensee* and not simply the word "tender"?

Mr. LENROOT. I think "tender" would cover it. If they do not tender a license to the *new licensee*, then they can permit the old licensee to operate the property from year to year.

Mr. WALSH of Montana. Suppose they do tender it and it is not accepted.

Mr. LENROOT. If it is not accepted, should the original licensee desire so to do, he may continue from year to year.

Mr. WALSH of Montana. But if it is tendered to the *new licensee* and he does not take it the original licensee would not

have a right then to operate the plant from year to year. It must be issued to the *new licensee* in order to make the case.

Mr. LENROOT. I think "tender" makes the case. A tender protects the original licensee.

Mr. WALSH of Montana. I understand that; but let me cite a case to the Senator. A *new licensee* asks for a license and the license is tendered to him, but he does not take it. The conditions now exclude the original licensee from getting his year-to-year license.

Mr. LENROOT. I see the Senator's point. That, however, could, of course, be very easily remedied by making the proviso read "issue to the *new licensee* or tender to the original licensee."

Mr. FLETCHER. May I ask the Senator, if there is a tender of a new license to the *new licensee*, is it not fair to say that that tender of a new license ought to be on reasonable terms? Is there any objection to that?

Senate—January 12

[. . . p.1435]

Mr. SMOOT. In the first place, I want it distinctly understood that I am not in accord with the statement made that the bill gives away the last of the natural resources of the country. The bill gives away nothing. The company which develops a water power secures the money for so doing and runs all of the chances of the enterprise being a success or a failure. The Government of the United States takes no chances whatever. If it is not a paying proposition, the Government of the United States would still collect as much money as the contract calls for for every horsepower that is developed upon the project. Not only that, but the price at which the power [1436] can be sold is to be fixed, regulated, and controlled by officials of the Government; and I now state, as far as I am personally concerned, I would not want to take any interest whatever in any power project that may be undertaken under the provisions of the pending bill.

The pending bill is a compromise measure, just the same as the leasing bill was a compromise measure, and agreed to with a hope of future development of the natural resources of our Western States, which at the present time and for years past have been locked up and the situation absolutely controlled by the bureaus here in the departments at Washington, so that all development of water power ceased. If any person or persons undertake to develop a water power, even though the site be upon lands not withdrawn from entry, as soon as the announcement is made by the party who has concluded that a power plant could be successfully established, the Government of the United States, no matter how much money he has spent upon his preliminary work, immediately withdraws it, and all improvement ceases.

So, Mr. President, there is not very much of a gift found in the provisions of the pending bill, and there never can be a very great profit made out of any project developed under it. I think that more benefit will come to the country by the passage of

this bill from power plants developed upon navigable streams of this country than in the sparsely settled Western States, where the great inland water powers can be developed. I know of electric power companies investing large amounts of money in the development of power, and it has taken 10 years or more before even the running expenses of the company could be paid from the revenues received from the sale of the power.

I am not objecting to the regulation on the part of the Government, as provided in the bill; but I do think that every charge that is imposed upon every horse power generated will be passed on [to] the consumer, and at the same time the people living in the States where these power sites are located prevented from collecting taxes from withdrawn lands, in some cases reaching as high as 76 per cent of the area of the State, and that being so you can readily see that all the expenses of maintaining an orderly form of government must be met by the imposition of taxes upon the industries and improvements of the remaining 24 per cent of the area of the State. The Government of the United States holds its hand over that 76 per cent. No taxes can be imposed, no development can be made, and the State is barred from receiving any benefits of taxation.

The Senator asks if the Government does not take over the license at the end of 50 years, what is going to happen? If a *new licensee* does not take it over at the end of 50 years, what is going to happen? Why, Mr. President, if the Government will not take over the plant at the end of 50 years, and if it can not find a *new licensee*, it will be operated by the owners from year to year until the Government does take it over or finds a *new licensee*. What reason for complaint has the Government or the people if the plant is so uninviting that a *new licensee* can not be found or the Government itself decides it is not worth the taking over?

Why, Mr. President, is the privilege of allowing the owners of the plant to run it another year a special favor, a special privilege to the company that has put its money into the business and operated it for 50 years? Nonsense! The company may

only be making a profit of 1 per cent. It may be that it is making no profit at all, and under such conditions a *new licensee* would not want to take it over. Why should he? He can find better use for his money. If it is in such condition that the Government will not take it over, what disadvantage is there to the Government or the people if the man who has developed the property runs it for another year, and at the end of just one year's extension, if the Government will not take it over or a *new licensee* can not be found that will take it over, who is going to be hurt if it is operated by the owners? The Government will be getting its charges for another year. Every 12 months the same question will arise. Does any Senator think for a minute that a concern operating a plant of that kind wants to be put in that position, that it knows nothing about what is going to happen to its business at the end of every 12 months?

I want to say that the result will be that when a company constructs one of these plants, unless at the end of 50 years the Government wants to take it over, and it is profitable to do so, or unless the Government can find a *new licensee*, you can depend upon it that there has not been very much profit for the man who is operating it under the 50-year lease.

Mr. LENROOT. Mr. President, will the Senator yield?

Mr. SMOOT. Yes; I yield.

Mr. LENROOT. Would the Senator be willing, then, to vote for an amendment striking out the provision with reference to severance damages, so that the Government or a *new licensee* might take over this property at what it was worth to them?

Mr. SMOOT. Mr. President, the severance damages are nothing more than any honest man in a transfer of such property would agree to with any honest purchaser. It is nothing more nor less than the Government agreeing that in the severance of the property from the original licensee, whatever damages there might be should be paid by the Government in case the Government takes over the property, or the *new licensee* if there should be one, and I say that no honest person can object to that principle.

Mr. LENROOT. What would the *new licensee* get for the severance damages that he would have to pay?

Mr. SMOOT. He would get whatever value the required severance was to him, and that would be the severance damage to the builder of the plant. Mr. President, I want to say that all of the disadvantages in building the plant, the time it took to build up a demand for the power, and all of the burdensome unseen expenses of starting any kind of a business like the ones contemplated under this bill fall upon the original licensee. The man who asks for the second license has nothing like this to pass through. The business, if it is successful, is established at that time. He steps in without an effort, and it does seem to me he should be perfectly willing to pay a reasonable price, as the bill provides, whenever the property is transferred to him as a *new licensee*.

Mr. LENROOT. The Senator understands he has to pay all those expenses, too, does he not?

Mr. SMOOT. Well, there is not any question of a doubt whatever that the severance of the property will be decided between the Government of the United States, or the man who first built the plant and put it into operation, and the *new licensee*. The original promoter of the business, if he remains in it for 50 years, or, if he does not, his successors in business, are never going to secure any advantage in the severance of it, and I say now that if the Government of the United States at the end of 50 years does not take over the property there will be some good reason for it. If the Government of the United States can not find a *new licensee* to take over the property there will be some good reason for it, and that reason will be that it will neither pay the Government of the United States nor pay a *new licensee* to do so. So every interest of the Government is protected, and every interest of the *new licensee*, if there be one, will be protected; and it seems to me that all that the severance provision does is to protect the first licensee, who took the first step to establish the industry. I know there is no man living who would say that he should not be protected in this, and that is all the bill does.

In relation to the words "which is accepted," what does it mean and what is the result of their use? I can not see the result as portrayed by the Senator from Wisconsin. They mean that if a *new licensee* is not found that will accept the terms offered by the Government, then the original licensee can proceed from year to year to operate the plant. Do not think for a minute that that is a favorable position for the licensee to be in with ten millions of dollars invested or one million or whatever the amount may be, not knowing whether he will be allowed to operate on the 2d day of January of each year. I say that every endeavor would be made and every point stretched to the limit by the original licensee to keep the plant in operation. The original licensee is entitled to know if the offer of the Government to the second licensee is accepted; then I say that the words "which is accepted" ought to be in this bill, for not only the protection of the man who has put his money into the concern and made it a going concern for 50 years, but also, it seems to me, Mr. President, it is nothing more than right between the Government of the United States and a second licensee. Why should it not be known that it is acceptable to the *new licensee*? If a licensee will not accept it, why should the original licensee be deprived of operating the plant year by year? Do you want it to stand idle? Do you want it to go to rack and ruin until some *new licensee* is found by the Government?

That is all there is to it, Mr. President, and I hope and trust the amendment offered by the Senator from Minnesota will be agreed to by the Senate.

NOV 12 1983

Nos. 82-1312, 82-1345 and 82-1346

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

UTAH POWER & LIGHT, COMPANY AND
THE MONTANA POWER COMPANY, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ALABAMA POWER COMPANY, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

PACIFIC GAS AND ELECTRIC COMPANY, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

*ON PETITIONS FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT*

**BRIEF FOR THE FEDERAL ENERGY
REGULATORY COMMISSION**

REX E. LEE

*Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217*

QUESTION PRESENTED

Section 15(a) of the Federal Power Act permits the Federal Energy Regulatory Commission, upon the expiration of a license to operate a hydroelectric facility, to "issue a new license to the original licensee * * * or to issue a new license * * * to a new licensee." Section 7(a) of the Act orders the Commission "in issuing licenses to new licensees under section [15] * * * [to] give preference to applications therefor by States and municipalities * * *."

The question presented is whether the statute requires the Commission, in a license renewal proceeding, to give a state or municipal application a preference over the original licensee's renewal application.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1312

UTAH POWER & LIGHT, COMPANY AND,
THE MONTANA POWER COMPANY, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

No. 82-1345

ALABAMA POWER COMPANY, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

No. 82-1346

PACIFIC GAS AND ELECTRIC COMPANY, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

*ON PETITIONS FOR A WRIT OF CERTIORARI TO
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THE ELEVENTH CIRCUIT*

**BRIEF FOR THE FEDERAL ENERGY
REGULATORY COMMISSION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a)¹ is reported at 685 F.2d 1311. The opinions and orders of the Federal Energy Regulatory Commission (Pet. App. 14a-78a, 79a-80a) are reported at 11 F.E.R.C. (CCH) para. 61,337 and 12 F.E.R.C. (CCH) para. 61,179, respectively.

¹"Pet. App." refers to the appendix to the petition in No. 82-1312.

JURISDICTION

The judgment of the court of appeals (Pet. App. 81a-82a) was entered on September 17, 1982. Petitions for rehearing were denied on November 12, 1982 (Pet. App. 83a-84a). The petitions for a writ of certiorari were filed on February 4, 1983 (in No. 82-1312) and on February 10, 1983 (in Nos. 82-1345 and 82-1346). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Part I of the Federal Power Act (formerly known as the Federal Water Power Act of 1920), 16 U.S.C. (& Supp. V) 791 *et seq.*, are set forth at Pet. App. 101a-117a.

STATEMENT

A. *The Statutory Framework*

In 1920, Congress enacted the Federal Water Power Act, ch. 285, 41 Stat. 1063 *et seq.*, which later became Part I of the Federal Power Act, 16 U.S.C. (& Supp. V) 791 *et seq.* The Act established a comprehensive federal program for licensing hydroelectric projects and created the Federal Power Commission (now the Federal Energy Regulatory Commission) to administer that program.²

²Prior to 1920, hydroelectric projects often had to be specifically authorized by Congress because such projects usually fell within the prohibition, in Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, against obstructions to the navigable capacity of the waterways. The first hydroelectric project constructed on navigable waters was authorized by Congress in 1890. 26 Stat. 454. In 1906, Congress formalized by statute the terms upon which it would grant such franchises. 34 Stat. 386.

In addition, before enactment of the Federal Water Power Act, regulatory authority over hydroelectric projects was dispersed among several different government agencies. The Chief of Engineers and the Secretary of War had authority, under the Rivers and Harbors Act of

The Act empowers the Commission, *inter alia*, to issue licenses for the construction, operation and maintenance of hydroelectric project works on waterways over which Congress has jurisdiction under its authority to regulate interstate and foreign commerce. 16 U.S.C. 797(e). The Act further empowers the Commission to issue preliminary permits to enable a prospective licensee to maintain its priority of application for a license for up to three years while preparing its license application. 16 U.S.C. 797(f) and 798.

Under Section 6 of the Act, 16 U.S.C. 799, licenses "shall be issued for a period not exceeding fifty years." (Most of the licenses the Commission has issued have been for the statutory maximum 50-year period (see Pet. App. 19a).) When an original license expires, the United States has the right to recapture the projects for its own use: Section 14(a) (16 U.S.C. 807(a)) provides that the United States may, upon expiration of the original license, take over and thereafter maintain and operate any hydroelectric project upon payment of the net investment of the licensee in the project plus reasonable severance damages. Because the investment will have been recouped over the life of the project, this amount is likely to be minimal as compared to the project's fair market value. Section 14(a) also reserves the right of the United States and of any state or municipality to take over any project at any time through condemnation proceedings upon payment of just compensation (*i.e.*, fair market value). See Pet. App. 17a-18a.

1899, to regulate hydroelectric projects, primarily to prevent obstructions to navigation, while the Secretary of the Interior was empowered to grant rights-of-way over public lands for the construction of electrical transmission lines. 29 Stat. 120. The Secretary of Agriculture also possessed some authority to regulate hydroelectric projects. 33 Stat. 628. See J. Kerwin, *Federal Water Power Legislation* 105-115 (1926).

The provision at issue here is Section 7(a) of the Act, 16 U.S.C. 800(a). There is no doubt that this section requires the Commission to give a preference to applications by states and municipalities for preliminary permits and for initial licenses where no preliminary permit has been issued, so long as the applications filed by the state and municipal entities are "equally well adapted" to conserve and utilize in the public interest the region's water resources as are competing applications by private entities.³ When an original license has expired, Section 7(a) provides that, "in issuing licenses to new licensees under section [15] hereof the Commission shall give preference to applications therefor by States and municipalities * * *." Section 15(a), 16 U.S.C. 808(a), provides, in turn, that if, upon expiration of the original license, the United States does not exercise its right of recapture,

the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing

³As between other applicants, Section 7(a) generally provides that the Commission may give a preference to the applicant whose plans are "best adapted" to develop, conserve and utilize in the public interest the water resources of the region.

⁴Section 7(a), 16 U.S.C. 800(a), provides:

In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section [15] hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

laws and regulations, or to issue a new license under said terms and conditions to a new licensee * * *.

As a condition of issuing a new license to a new licensee, the new licensee must, before taking possession of the project, pay to the original licensee the amount that the United States would be required to pay under the recapture provisions of Section 14(a) (*i.e.*, net investment plus reasonable severance damages).

This case involves the question whether the state and municipal ("public") preference in Section 7(a) of the Act applies in a relicensing proceeding as against an investor-owned ("private") licensee that has applied for a successor license.

B. The Proceedings Below

1. In 1979, the Commission determined that it would address the question of statutory construction in a generic declaratory proceeding, rather than deciding it in the context of an adjudicatory relicensing proceeding (Pet. App. 118a-122a). The declaratory proceeding, in which virtually all of the investor-owned non-public licensees participated, resulted in the issuance of Opinion No. 88 (Pet. App. 14a-78a). In Opinion No. 88, the Commission concluded that under Section 7(a) the public preference does operate in license renewal proceedings.

The Commission first examined the statutory language and held that the distinction between "original licensees" and "new licensees" in Section 15(a) could not be carried over into Section 7(a) "because the contexts of usage are different" (Pet. App. 56a). The Commission found that Section 15(a) deals with "predecessor/successor relationships in a context of successive license terms," whereas Section 7(a) deals with the process of "choosing applicants as licensees for the forthcoming license term, whether that is

the initial term or a successor term" (Pet. App. 60a). Accordingly, the Commission concluded, on the basis of "intrinsic evidence within the statute[,] that Section 7(a) 'new licensees' are those who may be chosen (*i.e.*, the applicants) for the new or forthcoming license term, which status has no necessary relationship to the question of whether they are 'new' or successor licensees as between two license terms in the context of Section 15(a)" (Pet. App. 60a-61a).

Turning to the legislative history, the Commission noted that the bill proposed by the administration in 1918 (H.R. 8716, 65th Cong., 2d Sess.) contained no limitation on the Commission's authority to prefer license applications filed by states and municipalities, and that "the municipal preference in Section 7 of the Administration Bill clearly applied to the issuance of all successor licenses" (Pet. App. 62a). In the Commission's view, "the application of the municipal preference to successor licenses became obscured through * * * successive amendments" to Section 7 (Pet. App. 62a). The Commission concluded that, in adding the phrase "and in issuing licenses to new licensees under section 15 hereof," Congress sought "to express the same municipal preference with respect to successor licenses that was in Section 7 silently immediately before its amendment" (Pet. App. 63a).⁵

⁵The Commission noted that the Senate Report (S. Rep. No. 180, 66th Cong., 1st Sess. (1919)) "described this amendment as one of a general body of amendments that were 'of a minor character' and made 'more clear and certain the meaning of the House provisions,' "and that "[t]he interpretation * * * that 'new licensees' are any licensees under a successor license, is the *only* interpretation that is consistent with the official explanation" (Pet. App. 63a; emphasis in original).

In addition, the Commission relied on the identical explanation of the legislation as it emerged from conference by O.C. Merrill, the principal Administration spokesman, and by Congressman Lee, a

The Commission denied rehearing in Order No. 88A (Pet. App. 79a-80a). In doing so, however, the Commission cautioned (*id.* at 80a) that

nothing in either the intrinsic or the extrinsic evidence on the meaning of Section 7(a) is clearly dispositive of the question before the Commission. The Commission has, in Opinion No. 88, attempted to give full effect to the general purpose of Section 7(a), in the context of Part I of the Federal Power Act, and reflected then on the lengthy and occasionally opaque legislative history. Nothing in the most recent arguments persuades us that we should reverse our determination made in Opinion No. 88.

2. The court of appeals affirmed the Commission's order (Pet. App. 1a-13a). It determined that both meanings accorded to the Section 7(a) term "new licensees"—*i.e.*, the broad one adopted by the Commission and the narrower one corresponding to the Section 15(a) distinction between new and original licensees—are reasonable (Pet. App. 9a). The court accordingly concluded that the statutory language "is sufficiently ambiguous to merit resort to legislative history" (*ibid.*). After reviewing the legislative history relied on by the Commission (*id.* at 10a-12a & nn. 7-9), the court concluded that, although much of the material is "weak," it was appropriate in this case to "give great deference to the Commission's interpretation" (*id.* at 12a).

member of the conference committee (Pet. App. 44a; Commission's emphasis; see *id.* at 64a):

In the development of water powers by agencies other than the United States, the bill gives preference to States and municipalities *over any other applicant*, both in the case of new developments and in case of *acquiring properties of another licensee at the end of a license period*.

C. Events Occurring Since The Decision Of The Court Of Appeals

Following the filing of the instant petitions for certiorari, the Commission met for the purpose of formulating its recommendation to the Solicitor General concerning the Commission's response to the petitions. We are informed that at this meeting, a majority of the Commissioners, four of whom were appointed after the issuance of Opinion Nos. 88 and 88A, expressed their disagreement with the Commission's earlier position in those orders. At the conclusion of the meeting, the Commission voted to request the Solicitor General to recommend to this Court that the Court grant the petitions for certiorari, vacate the judgment of the court of appeals, and remand the case to that court with instructions to remand to the Commission for further consideration.

DISCUSSION

(a) This case presents a highly significant question of statutory construction concerning the scope of the state and municipal preference on relicensing in Section 7(a) of the Federal Power Act. The original 50-year licenses for many hydroelectric facilities have expired in the recent past or will expire in the near future.⁶ The vast majority of projects have not yet undergone relicensing proceedings. The declaratory order under review here purports to determine the question of the scope of the preference on a generic basis, and will be relevant to numerous relicensing proceedings. It is no exaggeration to say that, potentially, billions of dollars are involved.

Moreover, if the issue of statutory construction is not reexamined in this case, there is a serious question whether it can be subjected to further judicial scrutiny in a subsequent case. It is our understanding that virtually all of the

⁶Until the Commission issues a new license for these facilities, it will continue to issue annual licenses to the current licensee pursuant to Section 15(a) of the Act.

investor-owned utilities that own and operate federally licensed hydroelectric facilities were parties to this case. Under traditional *res judicata* principles, if this Court denies certiorari and the court of appeals' judgment affirming the Commission's declaratory order becomes final, these entities may be bound by the Commission's order in any future relicensing proceeding.

Further, we note that the question presented is undeniably a difficult one. When the matter was before it for decision, the Commission acknowledged that it could find nothing in the statute or its history that is "clearly dispositive of the question" (Pet. App. 80a). In its decision affirming the Commission, the court of appeals similarly observed that the statutory language is "ambiguous" (*id.* at 9a) and the legislative history material is "weak" (*id.* at 12a).

(b) This case is further complicated by the fact that the Commission now wishes to reconsider the case, and that a majority of the Commissioners appear to be ready to overrule Opinion Nos. 88 and 88A and adopt the contrary position. The situation created by these new circumstances is especially delicate in view of the fact that the court of appeals, in interpreting the statute as it did, gave "great deference" to the Commission's previous views (Pet. App. 12a).

(c) The Solicitor General believes that, given the importance of the question, the apparent changes in the views of the Commission, and the basis for and nature of the court of appeals' opinion, the petitions for certiorari should not simply be denied. Rather, the court of appeals should itself be given an opportunity to reconsider the case and reevaluate its own decision in the light of these developments. That court is familiar with the case and has already spoken to it; it is in the best position expeditiously to ascertain the current positions of all the parties and then to decide whether it

wishes simply to adhere to its opinion, or whether it wishes either to reexamine the question itself or to remand to the Commission for a new order setting out and explaining the Commission's current views.

The Solicitor General therefore urges the Court to grant the petitions for certiorari, to vacate the judgment of the court of appeals, and to remand the case to that court for such reconsideration as it deems appropriate in light of the intervening circumstances.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to that court for such further proceedings as that court deems appropriate.

Respectfully submitted.

REX E. LEE
Solicitor General

MAY 1983

FILED

MAY 18 1983

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY, *et al.*,
Petitioners,
v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

ALABAMA POWER COMPANY, *et al.*,
Petitioners,
v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PACIFIC GAS AND ELECTRIC COMPANY, *et al.*,
Petitioners,
v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

**BRIEF IN OPPOSITION OF RESPONDENT,
AMERICAN PUBLIC POWER ASSOCIATION,
TO PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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May 18, 1983

QUESTION PRESENTED

Upon expiration of a license for a hydroelectric project, the original licensee and new applicants for a license may compete for issuance of a new license. The opinions of the Federal Energy Regulatory Commission and Court of Appeals require that the Commission evaluate numerous factors in deciding which applicant is entitled to receive a new license. The question presented is: If evaluation of all public interest and statutory factors results in a finding by the Federal Energy Regulatory Commission that the competing applicants' plans are "equally well adapted to conserve and utilize in the public interest the water resources of the region," whether the preference right of states and municipalities contained in Section 7(a) of the Federal Power Act entitles the preference entity to the new license in a contest with the original licensee?

PARTIES TO THE PROCEEDINGS BELOW

Respondent American Public Power Association is a national service organization composed of more than 1,750 municipal and state-owned electric utilities in 49 states. It was an intervenor in both the Court of Appeals and proceedings before the Federal Energy Regulatory Commission in this matter. Its members include municipalities, state power authorities and districts, and other publicly-owned utilities that generate, transmit, and distribute electricity. A list of the parties in the Court of Appeals is contained in Appendix 5 of the Petition for a Writ of Certiorari filed by Alabama Power Company, *et al.*

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**BRIEF IN OPPOSITION OF RESPONDENT,
AMERICAN PUBLIC POWER ASSOCIATION,
TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

Respondent American Public Power Association hereby submits its brief in opposition to the petitions for writs of certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 685 F.2d 1311 (11th Cir. 1982) and is set forth in the Appendix of Petitioner, Pacific Gas and Electric Company ("Pet. App.") at 1(a) *et seq.* Opinion and Order No. 88 ("Opinion No. 88") of the Federal Energy Regulatory Commission ("FERC" or "Commission") and its Order No. 88-A Denying Rehearing ("Opinion No. 88A") are reported at 11 FERC (CCH) ¶ 61,337 and 12 FERC (CCH) ¶ 61,179, and are set forth at Pet. App. 14a *et seq.* and 82a *et seq.*

JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 1982, Pet. App. at 84a. The Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on November 12, 1982, Pet. App. at 85a. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Part I of the Federal Power Act (the "Act"), formerly known as the Federal Water Power Act of 1920, 16 U.S.C. § 792 *et seq.* Sections 7, 14, 15, and 22 of the Act are set forth at Pet. App. 88a *et seq.*

STATEMENT OF THE CASE

The Federal Power Act authorizes the Federal Energy Regulatory Commission, successor to the Federal Power Commission, to issue licenses for hydroelectric projects located on navigable waters. Section 6 of the Act (16 U.S.C. § 799) prohibits the issuance of licenses in perpetuity. Instead, that section provides that licenses "shall be issued for a period not exceeding fifty years."

During this fifty-year period, the licensee has the opportunity to recover its costs and earn a return on its investment from the project's operation. Upon expiration of the license, the federal government retains the right to take over the project for the federal government's own use or to issue a new license, either to the original licensee or a new operator. Sections 14 and 15, 16 U.S.C. §§ 807,808.

In issuing licenses for previously licensed projects under Section 15, the Commission must apply the requirements of Section 7(a) of the Federal Power Act, 16 U.S.C. § 800(a). Section 7(a) provides that the Commission:

"shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region. . . ."

If a party other than the original licensee obtains a new license, the new operator must compensate the original licensee for its "net investment" plus "severance damages." Section 3(13), 16 U.S.C. § 796(13) ("net investment"); Section 14, 16 U.S.C. § 807 ("severance damages").

A. Proceedings Before the Commission

In the mid-1970's, the City of Bountiful, Utah and Utah Power & Light Company ("UP&L") filed competing applications for a license to operate the Weber River hydroelectric project. This project was then being operated by UP&L, pursuant to year-to-year authorizations, after UP&L's fifty-year license expired in 1970. In 1978, Bountiful asked the Commission to issue a declaratory order clarifying the application of Section 7(a) of the Act in these circumstances.

After consolidating Bountiful's request with a similar petition by the City of Santa Clara, California, the Commission

initiated a proceeding to address the question.¹ The Commission limited its inquiry to the purely legal issue of statutory construction.

“[T]he principal question to be decided is not the policy issue of whether it is factually or politically wise for States and municipalities to have a relicensing preference against citizen and corporation licensee-applicants, but the legal issue of whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920.” Pet. App. at 23a.

Thereafter, following extensive briefing and oral argument, the Commission unanimously issued Opinion No. 88 declaring that:

“the preference of Section 7(a) of the [Act] favoring States and municipalities over citizens and corporations is applicable to all relicensing applications in which States or municipalities, and citizens or corporations, request successor licenses for the same water resources.” Pet. App. at 24a.

The Commission’s careful and exhaustive decision examined the language of Section 7(a), and reviewed the voluminous legislative history of the Act. It found that the preference of Section 7(a) operates only after the Commission determines that the plans of the state or municipality are, in the language of Section 7(a):

“equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region. . . .” Pet. App. at 24a.

In short, the Commission declared that there is a preference which operates as a “tie-breaker rule.” Pet. App. at 77a.

¹ The City of Santa Clara and Pacific Gas and Electric Company had pending applications for a new license for PG&E’s Mokelumne River Project. Pet. App. at 21a.

The Commission eschewed any attempt to provide a “definitive statement . . . as to what showings should and must be made by the applicants in seeking to demonstrate how their plans compare.” Pet. App. at 78a. Rather, it offered general guidance on the factors to be used to determine whether competing proposals are “equally well adapted.”

Significantly, the Commission rejected as premature arguments by private utilities (identical to those now being presented to this Court by petitioners) concerning the impact of license transfers. The Commission concluded that any alleged disruptive effect would be considered in the light of facts and circumstances of each particular case, in determining whether the applications were “equally well adapted.” Pet. App. at 81a.

B. Proceedings in the Court of Appeals

After the Commission denied rehearing (Pet. App. at 82a-83a), petitioners appealed to the United States Court of Appeals for the Fifth Circuit. Following creation of the Eleventh Circuit, a panel of that Court unanimously affirmed the Commission’s decisions.²

The Court of Appeals agreed that petitioners’ request for declaratory relief raised “a purely legal question” regarding the meaning of Section 7 of the Act. Pet. App. at 1a. The Court found that Section 7 provided a preference for states and municipalities in three situations: in issuing preliminary permits; in issuing licenses where no permit has been issued; and in issuing licenses to new licensees under Section 15. As analyzed by the Court of Appeals, the instant case involved only the third situation, specifically whether the statutory preference applied to all contests involving states or municipalities, or whether its application was “limited” to contests in which the original licensee was not among the applicants for a new license. Pet. App. at 8a-9a.

Although the Court concluded that the language of Section 7 was susceptible to more than one interpretation, it noted that application of a “limited preference” for states or municipalities

² Appeals brought in the D.C. and Tenth Circuits were consolidated with those in the Fifth Circuit.

"would cause administration of the Act by the Commission to be confusing and sporadic" and would lead "to an absurd result." Pet. App. at 10a.

"Under this theory, the only time a license holder would fail to obtain reissuance of a license would be when the water project was not profitable. Thus, states and municipalities realistically would have no preference at all because a preference to a losing project is worthless." *Id.*

Turning to the legislative history of the Act, the Court examined the writings of Oscar Charles Merrill³ and Gifford Pinchot⁴ as well as testimony before the House Special Committee by private industry representatives and the Secretary of the Interior. On the basis of this material, as well as the Commission's interpretation of the statute, the Court concluded that the state and municipal preference of Section 7(a) "applies to all competitive relicensing cases, not just those where the original licensee is not an applicant." The Court of Appeals also upheld the Commission's decision that "the preference applies in a tie-breaker situation." Pet. App. at 13a.

Following denial of a petition for rehearing and suggestion for rehearing *en banc*, petitioners sought certiorari in this case.

C. Subsequent Developments

While the instant petitions were pending in this Court, "a majority of the Commissioners, four of whom were appointed after the issuance of Opinion Nos. 88 and 88A [in 1980], expressed their disagreement with the Commission's earlier position in those orders." Brief of the Solicitor General for the

³ O.C. Merrill was Chief Engineer of the Forest Service when the Act was being considered by Congress. "His role in developing the [Act] is unique in that he became a principal advisor on water power to Congress, if not the principal advisor, as well to the President [Wilson] and his Cabinet." Pet. App. at 31, n. 18. This Court has previously cited Merrill's testimony before the House Committee on Water Power as representing the views of the Secretaries of Agriculture, the Interior, and War. *United States v. Public Utilities Comm'n of California*, 345 U.S. 295, 305 n. 10 (1953).

⁴ Gifford Pinchot served as Secretary of the Interior in the Roosevelt and Taft Administrations. As President of the National Conservation Association, he was instrumental in drafting Section 7. Pet. App. at 12a.

Federal Energy Regulatory Commission at 8 (hereinafter Sol. Gen. Br.). Accordingly, the Commission voted to request that the Solicitor General recommend that this Court grant the petitions for certiorari, for the purpose of vacating the judgment of the Court of Appeals and remanding the case to that court "with instructions to remand to the Commission for further consideration." *Id.*

On May 11, 1983, the Solicitor General filed his brief in this Court. Only partially acceding to the Commission's request, the Solicitor General has asked this Court to grant the instant petitions and remand the case to the Court of Appeals to enable that court to "reconsider the case and reevaluate its own position." Sol. Gen. Br. at 9. The Solicitor General cited no precedent for this disposition and made no claim that the Commission wished to present evidence or arguments that had not previously been considered by the Court of Appeals when it unanimously affirmed the Commission's decision and denied rehearing *en banc*. Rather, the only basis for this extraordinary request was that, following the appointment of four new Commissioners, the situation has become "especially delicate" because "a majority of the Commissioners appear to be ready to overrule Opinion Nos. 88 and 88A and adopt a contrary position." *Id.* In effect, the Solicitor General has conceded that the Commission's new majority seeks a remand not to "reconsider" its decision, but to "overrule Opinion Nos. 88 and 88A" despite not having participated in those proceedings.

REASONS FOR DENYING THE WRIT

A. This Case Does Not Involve an Automatic Reallocation of the Nation's Hydroelectric Resources

Petitioners contend that, upon expiration of a hydroelectric project's license, a preference entity will almost automatically "take control at relicensing of the nation's privately operated hydroelectric projects, without demonstrating that the public interest would thereby be better served." Petition of Pacific Gas and Electric Company at 10.

This is a misleading argument. The preference applicant is not guaranteed award of a license solely because of its status as

a state or municipality. In Opinion No. 88, the Commission did not adjudicate competing license applications and did not apply the standard of Section 7(a). Rather, the Commission granted declaratory relief, holding that the municipal preference would apply in a contest involving an original license, *but only if* the Commission found that the plans of the state or municipal applicant are "equally well adapted" to those of other competitors.

Both the Commission and Court of Appeals recognized that the preference was a "tie-breaker" to be used in proceedings when competing plans were otherwise "equally well adapted." The petitioners ignore these rulings, and suggest a far broader application of Opinion No. 88 than intended by the Commission.

The Commission held that in deciding which applicant would receive a license, it would adopt the characterization of counsel for Petitioner Utah Power and Light and evaluate "the public interest in its broadest sense." *Id.* at 78a-79a. It observed that regardless of which applicant is selected, a project must be "best adapted" to beneficial public uses. This evaluation requires consideration not only of physical and technical factors but also, according to the Commission, such issues "as economic costs and benefits, [and] the distribution of the benefits of hydropower and similar pertinent potential impacts." *Id.*

The Commission directed that the processing and consideration of pending relicensing cases, involving an applicant asserting the statutory preference against a competing applicant, should go forward in light of Opinion No. 88; the Commission would thereafter make its determinations based upon the record made in connection with each particular case. *Id.* at 81a.

The Commission's decision to conduct an evaluation of many factors in considering competing applications nullifies petitioners' contentions that hydroelectric projects will be almost automatically licensed to state or municipal utilities. Its decision merely establishes general guidelines that will be

applied in a concrete setting only in contests between municipal and private applicants which cannot otherwise be resolved.⁵ In short, the decisions below may prove to have a more limited impact than that asserted by the petitioners and do not merit the exercise of this Court's certiorari jurisdiction.

B. The Court of Appeals Correctly Construed Section 7(a) of the Act

1. The Meaning of Section 7(a)

Section 7(a) of the Act authorizes the Commission to give a relicensing preference to states and municipalities "in issuing licenses to new licensees under Section 15" The Commission held that this statutory preference applies in all cases where the agency must decide whether to issue a new license. The Court of Appeals affirmed that decision, holding that the Commission's construction of the statute was consistent with its "language structure, scheme, and available legislative history." Pet. App. at 9a. The Court of Appeals also rejected petitioners' claim for a more "limited" preference, finding that such an interpretation would lead to an "absurd" result.

The language of Section 7 establishes that it was designed to govern the decisional process whenever the Commission must evaluate competing applications for a "new license." It contains no exception for contests involving an application by the original licensee.

The petitioners would read Section 7(a) as though it limited the preference to contests "only against applicants seeking the right to operate an existing project for the first time." This condition is absent from the statute, and petitioners have failed to cite any portion of the voluminous legislative history showing that Congress inadvertently excluded it. The

⁵ Petitioner Pacific Gas and Electric claims there is a "risk" that the municipal preference will be used as more than a "tie-breaker." This is simply not supported in the record and must be dismissed as speculation. The passage from Judge Mikva's dissent in *City of Dothan v. FERC*, 684 F.2d 159, 166 (D.C. Cir. 1982), cited by PG&E, carefully avoided discussion of the application of the tie-breaker in contests involving municipalities.

language of Section 7(a) simply contains no support for the so-called "limited" preference advocated by petitioners.⁶

2. The Legislative History of Section 7(a)

(a) Initial Congressional Action

As the Commission demonstrated in its extensive analysis of the Act, this legislation was a Progressive Era measure, designed to assure that the Nation's water power resources would revert to the public, and "to place a time limit on a private lessee's or licensee's use of the resources." Pet. App. at 30a.

The bill which led to the passage of the Federal Water Power Act was introduced in the 65th Congress in 1918 as H.R. 8716. It was a Wilson Administration measure prepared under the direction of the Secretaries of Agriculture, Interior and War. In a memorandum written to the President on October 31, 1917, Mr. O.C. Merrill, whom all parties concede was a principal draftsman of H.R. 8716, explained the objectives of what eventually became Section 7(a).

"Licenses should terminate at the end of the fifty-year period in order that the United States may at that time dispose of the privileges as the public interest and the law and regulations then existing may require. In such disposition *the order of preference should be as follows: (1) the United States—to acquire properties and operate them for Governmental*

⁶ Petitioners rely heavily on Section 15(a) of the Act which distinguishes between "new licenses [issued] to the original licensee" and "new licenses . . . [issued] to a new licensee." Nothing in Section 15(a) indicates that it was designed to limit the preference of Section 7(a). Moreover, as the Commission held, Pet. App. at 59a-62a, this distinction cannot be carried over into Section 7(a) "because the contexts of usage are different." Section 15(a) makes this distinction solely to establish that only a successor licensee must compensate an original licensee for its net investment, plus severance damages, "as the United States is required to do" if it were to undertake operation of the project. Indeed, the only cross-reference in Section 15(a) is to Section 14, which sets forth the obligations of the United States in the event of federal operations. See also Sol. Gen. Br. at 5-6.

purposes, (2) the State or municipality—to acquire the properties and operate them for municipal purposes, (3) the original licensee—to secure renewal under conditions prescribed by then existing law and regulations, (4) any other applicant—under similar conditions. These provisions will leave the way open for future public ownership and operation if the experience of the next fifty years shall have established the wisdom of such a policy.” Pet. App. at 32a-33a (emphasis supplied).

After H.R. 8716 was introduced, Merrill stated to the House Special Water Power Committee that Section 7 would assure the Commission “the discretion . . . to prefer any municipality over a private applicant.” Hearings on H.R. 8716 Before the House Committee on Water Power, 65th Cong., 2d Sess. (1918) at 55.⁷

This was also the understanding of others involved in consideration of H.R. 8716. For example, the following colloquy, quoted by the Court of Appeals (Pet. App. at 11a), took place between Congressman E.S. Candler and a witness for private industry:

“Mr. Candler. Now then you do understand that under this bill the Government of course has the first right to retake the property?

“Mr. Hall. Yes, sir.

“Mr. Candler. Then do you further understand it that a provision of the bill further is that some of the licensees might be preferred over the first licensee?

⁷ As initially introduced, Section 7(a) would have provided:

“That in issuing licenses hereunder, the commission may in its discretion give preference to application for licenses by States and Municipalities for developing power for State and municipal purposes, provided the plans for the same are deemed by the commission to be adapted to conserve and utilize in the public interest the navigation and water resources of the region” Pet. App. at 34a.

"Mr. Hall. The bill provides that; yes, sir. They can take it away and give it to somebody else.

"Mr. Candler. Then the original licensee would have only the third opportunity to count on his lease.

"Mr. Hall. That is the way I understand it." Pet. App. at 35a.

The Secretary of the Interior expressed a similar view. House Hearings, *supra* at 464.⁸

H.R. 8716 passed the House after various changes which extended the preference to "preliminary permits" and made it mandatory rather than discretionary.⁹ The Senate passed its own bill, which provided a more limited preference. See 56 Cong. Rec. 225-26 (1917) (Schiels bill). The Conference accepted the House version, with "clarifying" amendments.¹⁰ Pet. App. at 39a. Congress took no final action that session.

⁸ Petitioners rely on a different colloquy between the Chairman of the Special Committee and the Secretary of the Interior, in which the Chairman opined that states and municipalities would not be preferred over an original licensee. Petition of Pacific Gas and Electric at 8, *citing* Pet. App. 36a. Yet a review of that testimony, Housing Hearings at 453-54, *plus* earlier testimony, House Hearings at 380-81, reveals that the Chairman and the Secretary were discussing an *automatic* preference, as opposed to the "tie-breaker" which is contained in Section 7(a).

⁹ As passed by the House on September 5, 1918, Section 7(a) provided:

"That in issuing *preliminary permits or* licenses hereunder the commission [may in its discretion] *shall* give preference to applications *therefor* by States and municipalities provided the plans for the same are deemed by the commission [to be best] adapted to conserve and utilize in the public interest the navigation and water resources of the region . . ." (Additions italicized, deletions bracketed.) Pet. App. at 38a.

¹⁰ As reported by the Conference, Section 7(a) provided:

"That in issuing preliminary permits hereunder or licenses [hereunder] "*where no preliminary permit has been issued* the commission shall give preference to applications *therefor* by States and municipalities provided the plans for the same are deemed by the commission *equally well* adapted to conserve and utilize in the public interest and navigation ~~and~~ water resources of the region . . ." (Additions italicized, deletions bracketed). Pet. App. at 39a.

(b) Final Congressional Action

When the 66th Congress convened, a bill identical to that reported by the Conference was introduced as H.R. 3184. On June 24, 1919, H.R. 3184 was reported without change to the House floor. On July 1, 1919, this bill was approved by the House with minor amendments not affecting the municipal preference. See Pet. App. at 40a-41a.

On June 25, 1919, while H.R. 3184 was pending in the Senate, Gifford Pinchot, President of the National Conservation Association, and a strong supporter of public power, wrote to the Chairman of the Senate Committee, urging a number of changes. He stated, with respect to Section 7 that:

“The obvious intention of Sec. 7 is to give preference to States and municipalities; and you will not be accomplishing this purpose surely, unless you insert after the word ‘issued’ in line 11, page 12, of your bill, the words ‘and in issuing licenses to new licensees under Sec. 15 hereof,’ or words of like import.” Pet. App. at 42a-43a.

In September 1919, that Committee reported the bill with Section 7 changed to include Pinchot’s language (Pet. App. at 43a-45a):

“Sec. 7. That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued *and in issuing licenses to new licensees under Section 15 hereof* the Commission shall give preference to applications therefor by States and municipalities” (Emphasis added to Pinchot’s language.)¹¹

¹¹ Petitioner PG&E relies heavily on the Senate Commerce Committee changes to support its view that Section 7(a) provides only a “limited preference” for states and municipalities. As demonstrated above, however, these changes were designed to clarify, rather than restrict, the preference and were proposed by an observer hardly sympathetic to private power interests. See Pinchot, *The Long Struggle for Effective Water Power Legislation*, 14 Geo. Wash. L. Rev. 9 (1945).

H.R. 3184, embodying the Pinchot suggestion, passed the Senate on January 15, 1920. Pet. App. at 45a. The House disagreed with other Senate amendments and a conference was convened. O.C. Merrill then prepared a memorandum on the Senate amendments. He concluded that the amended version adding the phrase "in issuing licenses to new licensees" was a "desirable" addition which served to "strengthen" the provisions of Section 7. Pet. App. 45a.

Senate amendments to Section 7 were accepted by the House-Senate Conference Committee in April 1920. Merrill then prepared a "Memorandum on Features of Public Interest in Water Power Bill H.R. 3184" for Representative Lee, a floor manager for the Conference Report. This Merrill memorandum states:

"In the development of water powers by agencies other than the United States, the bill gives preference to States and municipalities over any other applicant, both in the case of new developments and in case of acquiring of properties of other licensees at the end of a license period." Pet. App. at 45a.

On May 4, 1920, Congressman Lee repeated Merrill's language to explain that the municipal preference applies "at the end of a license period." 59 Cong. Rec. 6527 (May 14, 1920). The Conference Report was approved by the House the same day. *Id.*

The Conference Report was approved by the Senate on May 28, 1920, and H.R. 3184 was transmitted to President Wilson on May 31, 1920. *Id.* Another Merrill memorandum, dated June 8 or 9, 1920, advised the President,

"For development by agencies other than the United States preference is given to States and municipalities. *A similar preference is given for the acquisition of the properties of other licensees at the end of the license period.*" *Id.* (emphasis supplied).

President Wilson signed H.R. 3184 on June 10, 1920.

This history leaves little doubt that the purpose of Section 7(a) was to provide a preference to states and municipalities in any relicensing contest, including one with the original applicant. The legislation was drafted to embody to objectives of the 1917 Merrill memorandum and was shepherded through Congress with this understanding. Indeed, less than two years after passage of the Act, Judge Clayton, author of the 1914 Antitrust Act and a member of Congress until 1914, explained in dicta the preference of Section 7(a).

"In further regard to the scope of the [Act], the national policy expressed in it is that the United States may at the expiration of 50 years take over any water project constructed under the act, and that *if the United States does not at the end of such period take over the project the state or municipality under section 7 is given the preferential right over the original lessee to a renewal of the license.*" *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, 617 (M.D. Ala. 1922) (emphasis supplied).¹²

C. The Extraordinary Request of the Solicitor General for a Remand to the Eleventh Circuit Should be Denied

In his May 11 brief, the Solicitor General requests that this Court exercise certiorari jurisdiction to remand this case to the Eleventh Circuit. The Solicitor General makes no claim that the Court of Appeals decision was wrong or that that court failed to consider the extensive arguments made below by the Commission and all other parties.¹³ Rather, the Solicitor's position is a

¹² Petitioners object to reliance by the Commission and Court below on "history" beyond that in the Congressional Record and committee materials. This Court has held, however, that it may consider "everything from which aid can be derived" in construing a statute, a precept of particular significance here. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall C.J.).

¹³ It is difficult to understand the purpose of a remand to the Court of Appeals. The case was fully briefed and argued below, with a panel of the Eleventh Circuit holding that the result of the Commission's new interpretation of Section 7(a) would be "absurd." A motion for reconsideration and a suggestion for rehearing *en banc* were also denied without dissent.

response to a request by the Commission's new members for a further remand to that body, so that these Commissioners may now reverse the position of their predecessors and hold that Section 7(a) did not mean what Opinions 88 and 88A said it did.

To conclude that this situation is extraordinary is a gross understatement. The Solicitor General has cited no precedent for this request. It surely is not customary for a regulatory commission, after successfully advocating a contrary view in the Court of Appeals, to ask this Court to permit it to change its construction of a statute, solely because the Commission's membership has changed.

There are obviously appropriate occasions to vacate the judgment of a lower court to give that court an opportunity to reconsider a case in light of changed circumstances. For example, this Court routinely vacates and remands cases for reconsideration in light of its intervening decisions. This Court also has vacated and remanded decisions where action by Congress has changed the nature of the controversy. *Western Oil and Gas Ass'n v. Alaska*, 439 U.S. 922 (1978) (vacation following amendments to the Outer Continental Shelf Lands Act). Similarly, we would be hesitant to criticize a reasonable request by an agency to consider new evidence or to re-evaluate a discretionary determination, if such a request did not prejudice any other party.

This case, however, presents a far different situation. The Solicitor General has candidly represented that the Commission's request was not made to permit an open-minded or fresh look at the controversy, but "to overrule Opinion Nos. 88 and 88A and adopt a contrary position," without benefit of participation in the earlier proceedings or a first-hand opportunity to hear the parties. Although the Commission would presumably hold some form of proceeding on remand, the Solicitor General's representation leaves no doubt about its outcome.

Perhaps most significantly, adoption of the Solicitor General's unfortunate suggestion will have significance far beyond this case. A regulatory commission is, of course, free to make

reasoned changes in its policies. But "there is an equally essential proposition that, when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law." K. Davis, 1980 Supplement to Administrative Law Treatise, § 17.07, at 111, *quoting Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977). *Cf. SEC v. Chenery Corp.*, 332 U.S. 194, 199 (1947) (decision based upon "thorough reexamination of the problem in light of the purpose and standards of the [Act]"). That test has not been met here. Indeed, if the Solicitor General's request were granted under these circumstances, then presumably any regulatory commission, dissatisfied with previous rulings on controversial subjects, could justify seeking remand of pending cases solely because a new majority was able to garner the votes to make the request.

Finally, if this Court concludes, contrary to the views of the private respondents, that this case merits certiorari, respondent American Public Power Association respectfully suggests that the appropriate course would be to set the case for oral argument on the merits.

The positions of the petitioners and the Solicitor General are premised on the view that this is a case of national importance, with significance beyond the interests of these parties. If this view is correct, then the *most* unsatisfactory result would be to introduce indefinite uncertainty and confusion in this area of the law. That uncertainty would undoubtedly be prolonged if this case were remanded to the Court of Appeals, with a subsequent remand to the Commission, followed by inevitable requests for further review by the Court of Appeals and this Court. Indeed, if this experience is any guide, it is not inconceivable that future Commissioners would seek to reverse a decision of the current commission, with the process continuing *ad infinitum*.¹⁴

¹⁴ For individual litigants, this situation could become especially grave. A FERC administrative law judge has already applied Opinion No. 88 in one relicensing contest. *Pacific Power & Light Co., et al. Project No. 935-000* (April 28, 1983). Presumably, if this case were remanded to the Commission, all such proceedings would be stayed pending the Commission's new decision.

CONCLUSION

The claims of the petitioners rest upon a misreading of the opinions below and an incorrect understanding of the practical implications of these opinions. The Solicitor General's brief does not refute this analysis, nor does it provide any reasoned basis for a further remand to the Eleventh Circuit.

These petitions for certiorari should be denied, or should be granted only as an alternative to the Solicitor General request for a remand to the Court of Appeals.

Respectfully submitted,

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May 18, 1983

MAY 18 1983

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PACIFIC GAS AND ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT
CITY OF BOUNTIFUL, UTAH

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May 18, 1983

QUESTION PRESENTED

Whether the United States Court of Appeals for the Eleventh Circuit was correct in affirming the decision of the Federal Energy Regulatory Commission that Section 7(a) of the Federal Power Act, 16 U.S.C. §800(a), requires that when the plans of a nonpreference original licensee and the plans of a state or municipality competing for a new hydroelectric license are "equally well adapted, to conserve and utilize in the public interest the water resources of the region," the tie shall be broken in favor of the preference applicant.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

Nos. 82-1312, 82-1345, 82-1346

UTAH POWER & LIGHT COMPANY, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT
CITY OF BOUNTIFUL, UTAH

REASONS WHY THE WRIT SHOULD BE DENIED

Respondent, the City of Bountiful, Utah, respectfully requests that this Court deny the petitions for a writ of certiorari, seeking review of the Eleventh Circuit opinion reported at 685 F.2d 1311.

The issue sought to be raised by the petitions is certainly not "insignificant." However, it is a narrow issue of pure statutory interpretation on which there is no reason to suspect that the decision of the court of appeals is incorrect. Given the more meritorious and more significant matters upon which review by this Court are being sought, the decision of the court of appeals below does not warrant further review.

Four commissioners of the Federal Energy Regulatory Commission, after extensive briefing and argument, have rejected the petitioners' views. Three judges of the court of appeals have rejected their position and the entire court has found the petitioners' views unworthy of reargument. In a 1922 decision in *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, 617 (M.D. Ala.), District Judge Clayton, who was in a unique position because of his prior role as a congressional leader during much of the formative period of the legislation, forthrightly stated that the "state or municipality under Section 7 is given the preferential right over the original licensee to a renewal of the license." No judge, commissioner, or any other holder of a presidential commission has ever in a litigated decision found merit in the petitioners' views. It is only through gross distortion of the record and of the holdings of the court of appeals and of the Commission that the petitioners have been able to present even a facially appealing argument that their position may have merit.

In attempting to escalate the impact of the decision below, the Hydro Group indicates that "its principal result will be only that the customers of the original licensees will lose the existing benefits from the projects, for which they have paid the amortization charges" (Pet. at 11).¹ That contention, of course, erroneously assumes that the same customers who paid amortization charges for an average of well over 55 years will continue to exist through the next 55 years. PG&E also urges that loss of the projects "*could*" (emphasis added) impose upon the affected utilities "additional costs of replacing their hydro-electric capacity with new fuel-burning facilities (Pet. at 9).

¹The Petition of the 33 private power companies filed under the caption of *Alabama Power Co. et al.* will be referred to as Hydro Group Pet., the Petition of Pacific Gas and Electric Company and Wisconsin Power & Light Company will be referred to as PG&E Pet., the Petition of Utah Power and Light Co. and the Montana Power and Light Co. will be referred to as the Utah Power Pet., the opinion of the Federal Energy Regulatory Commission ("FERC" or the "Commission") 11 FERC ¶ 61,337 will be cited as reproduced in the separately bound appendix to the PG&E Pet. (PG&E Pet. a), and the Joint Brief of the intervening public power entities to the court of appeals, filed October 5, 1981 will be referred to as the Joint Brief.

But, in many if not most instances, a municipality obtaining the new license will have previously bought all or the great part of its capacity from the utility holding the original license and, thus, there will be no need to replace the hydroelectric capacity. In any event, the total amount of capacity needed by the region will be unchanged by any outcome of a relicensing proceeding. PG&E also seeks to imply that the loss of hydroelectric projects will, because of their current integration into the existing owner's systems, result in a failure to "realize maximum efficiency" (*id.*) In the extremely rare instance when a loss in efficiency would result from a cause other than the refusal by the original licensee to permit the continued integration of the recaptured hydroelectric project with its other hydroelectric projects for maximum overall efficiency this impact can certainly be considered by the Commission as an aspect of its public interest finding.

For preference to act as a tie-breaker, as the Commission held, there must first be a tie between the plans of the applicants. They must, in the language of Section 7(a) of the Act be "equally well adapted, to conserve and utilize in the public interest the water resources of the region." The Commission in its opinion stated that its decisions in competitive relicensing cases would take into account "the public interest in its broadest sense." (PG&E Pet. 79a) Although the Commission has not yet issued a new license in a competitive relicensing proceeding, it must be assumed that it will carry out the law and that the result of its decision will be in accord with the public interest. It is certainly premature to seek review by this Court based upon a belief that the Commission will not carry out its duties.¹

¹The Motion and Brief as Amicus Curiae of the Public Utilities Commission of the State of California In Support of Petitions is typical of those filed by other state commissions. As the California PUC candidly states (at 9), it is the "duly authorized representative" of customers of "privately-owned utilities." It neither regulates nor represents customers of publicly-owned utilities. It therefore can hardly be termed a representative of the overall public interest.

A. Plain Meaning Requires The Court's Conclusion

1. The Commission's interpretation is the plain meaning of Section 7.

The Commission found the words "in issuing licenses" to new licensees under Section 15 must mean "in determining whether to issue licenses" to new licensees under Section 15. Since, in every competitive licensing situation one of the choices before the Commission must be the issuance of a license "to [a] new" licensee, this means that the preference will be applicable to all competitive relicensing proceedings.

On this – the crucial – point, the Commission held (PG&E Pet. 63a n. 44, emphasis added):

In certain places in the FPA the reference to the issuance of licenses is troublesome if restricted literally to the ministerial act of issuance. In Opinion No. 36-A (*Escondido Mutual Water Company, et al.*, Project No. 176), for example, we said, at 21, that the reference in Section 4(e) to the issuance of licenses "within any reservation" would not be construed literally to refer to a Commission vote upon the issuance of a license when the members of the Commission are physically within a reservation. So, too, the reference in Section 7(a) to "issuing licenses" should not be restricted to the ministerial act of issuance. *Since the Commission is required to make certain findings either before or in conjunction with its vote on the issuance of a license, the reference in Section 7(a) to "issuing licenses" should include the overall consideration of applications for licenses. And in that context, the more-inclusive phrase "in issuing licenses to new licensees" would mean simply "in considering applications of new licensees," or, as Santa Clara argues (supra, at note 15), "in determining whether to issue licenses to new licenses."*

This interpretation was the sole plain meaning interpretation urged upon the court of appeals both by the Commission and by the public power entities. It was, therefore, the interpretation

which the court of appeals determined to be reasonable when it found (PG&E Pet. 9a), "the public companies here have accorded one reasonable interpretation to the words 'new licensees' by relying on its context in Section 7(a)"

It is important to recognize that the public power entities in their Joint Brief to the court of appeals commented upon and challenged the failure of the private companies to provide any interpretation of "in issuing" that would support the plain meaning argument advanced by the private companies (e.g., Joint Brief at 15, 20). The private companies were unable or unwilling to do so in their reply briefs to the court of appeals and have continued to totally ignore the Commission's position, found reasonable by the court of appeals, in their petitions here.

The Commission's reading is demonstrably correct and compelled by the language of the Act. The words "in issuing" must refer to the process of considering applications rather than the conclusion of the process — the act of issuing the license. This is clear when we consider the situation in which all parties agree that the municipal preference is applicable—a contest between two applicants for a new license, one municipal, one private, neither of which is the original licensee. If the plans submitted by the private utility are initially superior to those of the municipality, all parties agree that the preference provisions of Section 7(a) require that the municipality be granted a reasonable time to make its plans "equally well adapted." Thus, the preference provision must be applicable during the *process* of issuing a license, but *before* any issuance of the license.

The simple fact is that in any competitive licensing situation (the only situation to which Section 7 is addressed) at least one of the applicants must be a new applicant applying for a new license. Thus, in any competitive situation the Commission is determining whether to issue a license to a new licensee under Section 15 and if one of the applicants is a municipality the preference must be applicable. Once it is established that "in issuing" means "in determining whether to issue," the question argued at such length by petitioners both

here and below – the meaning of the words “new licensee” in Section 7(a) and Section 15 becomes irrelevant.¹

Indeed, Utah Power, both an individual petitioner and a party to the Hydro Group Petition here, in its Petition for Rehearing to the Commission (R. 1285), accepted the Commission’s interpretation of “in issuing” (set forth at 4 above) and, indeed, urged upon the Commission the interpretation of the words “in issuing” as meaning “in determining whether to issue.”² The Hydro Group has acknowledged that Utah’s interpretation (and more importantly that of the Commission) is fatal to the position of the private power companies (Reply Brief to the Commission, R. 924, emphasis added):

Santa Clara’s disingenuous attempt to substitute “in determining whether to issue” for the words “in issuing” . . . would (1) make the preference applicable in issuing [new] licenses to original licensees.”

It is difficult to understand how the private power companies can seriously assert that their current interpretation of Section 7 is *the* plain meaning after one of their key members has urged upon the Commission an interpretation recognized by the others as utterly destructive of their position, four Commissioners of the Federal Energy Regulatory Commission

¹Although it is difficult to articulate any other meaning of “in issuing” in Section 7(a), it might be considered that “in issuing” refers to the conclusion of the decisionmaking process. This interpretation would still compel the same conclusion since preference operates to break a tie and therefore to control the decision upon the identity of the licensee. Thus, the result of applying preference as a tie-breaker would be “issuing licenses to new licensees.”

²Utah stated (Petition for Rehearing at 25, R. 1285, emphasis added):

The broader phrase *should* be interpreted consistently with Santa Clara’s and the Commission’s paraphrasing . . . see Opinion at 46, n. . 44 [quoted above at 4] as follows:
in determining whether to issue licenses to new applicants under Section 15 hereof.

have been unable to find their interpretation plain, and three judges of the court of appeals have found the Commission's interpretation reasonable.

The court of appeals, in its treatment of plain meaning, was more than generous to the private companies. Their interpretation of the cross reference in Section 7(a) to Section 15, even if accurate, does not conflict with the interpretation of the Commission and of the public power entities. Therefore, the correct result should and could have been the plain meaning interpretation sought by the public power entities.

2. The "plain meaning" interpretation advanced by the private companies is not the plain meaning of Section 7(a)

- a. The "plain meaning" interpretation advanced by the private companies is not derived from the unadorned wording of Section 7(a), but through the addition of limiting words not contained in that section.**

The private companies contend, as they must, that the "plain meaning" of Section 7 is that preference shall be granted only when the sole possible outcome of the process will be the issuance of a license to a new licensee; in other words, when there is no possibility that the original licensee will receive the new license because the original licensee is out of the picture (PG&E Brief to the Court of Appeals at 14). Preference, they argue, would then apply in evaluating the applications of the other applicants for a new license. But it is equally inevitable that the outcome will be issuance of a license to a new licensee, both when the original licensee is no longer in the picture and when there is a tie between the application of the original licensee and that of the preference entity.

Even accepting the proposition advanced by the private companies that preference attaches at the point when the inevitable outcome will be the issuance of a license to a new licensee, that point will have been reached in both of the situations just described and there is no language in Section 7

that suggests the interpretation that it is reached only in the former instance.¹

The private power interests do not specifically indicate *how* the words of 7(a) are to be plainly read to result in the interpretation they seek. They appear to read the language as though it said:

... in issuing licenses to new licensees under Section 15 hereof, the commission shall give preference to applications therefor by States and municipalities "only against applicants seeking the right to operate an existing project for the first time."²

We wonder whether the private power interests are even serious in claiming that their interpretation can be derived from the plain meaning of the Act. The Hydro Group has virtually acknowledged that it cannot be so derived. The Hydro Group stated (Brief to Court of Appeals at 16 n. 14, emphasis added) that:

Section 7(a) *appears* to give municipal applicants at both initial and relicensing stages an opportunity to make their plans "equally well adapted." To the extent the application requires the Commission to provide time for a municipal to improve its plans, it would be applicable under either of the interpretations of Section 7(a) which are being advanced by the parties to this proceeding.

¹The fact of the matter, however, is that nothing in Section 7 indicates that the issuance of a license to a new licensee must be the sole possible outcome of the process of deciding among competing applications before the municipal preference is to be applied.

²The portion enclosed in quotation marks appears in the Brief to the Court of Appeals of Utah Power at 10. The position of the other private power companies is similar. PG&E reads the Section 7(a) language as saying "municipal preference applies only against new licensees and not against an original licensee seeking to relicense its existing project" (Brief to Court of Appeals at 11). The Hydro Group reads it to mean that "the relicensing preference does not apply against the original licensee, but applies only among competitors to acquire the project as new licensees" (Brief to Court of Appeals at 4).

But if the language of Section 7(a) is examined, it is undeniable that the opportunity for the preference entity to improve its plans to create the tie is only to be granted when the tie-breaking preference provision is applicable.

- b. The interpretation of the private power interests treats the second preference of Section 7(a) as surplusage.

Section 7(a) of the Act contains two preferences. The first is the mandatory municipal preference, the second is a discretionary preference applicable to licensing competition between "other applicants" which permits the Commission to give preference to the applicant whose plans are "best adapted." Under the Commission's interpretation that Congress intended the first preference to apply to all contests involving a preference and a nonpreference applicant, the two preferences cover all competitive situations. Under the "plain meaning interpretation" of the private power companies, the Commission is given no standard as to choosing between a preference applicant and a nonpreference original licensee both seeking the new license. Yet, this was the most common situation which all interested parties — executive, congressional, and private power — expected to occur at the expiration of the original license. See pp. 17-19, *infra*.

The private power companies basically maintain that Section 10(a) of the Act provides the standard applicable in all cases. While that provision is not directed to competitive situations (see Joint Brief at 26-32), the fact remains that the Commission's interpretation provides meaning to the second preference contained in Section 7(a) while the private power companies' interpretation renders those 55 words entirely superfluous.

Even if careful analysis might disclose that Congress was wrong in believing that the second provision had meaning, the fact remains that Congress undoubtedly thought it had some meaning. Thinking it had some meaning, Congress would not have enacted it to cover the less likely situation where none of the applicants on relicensing were preference entities and

failed to provide any guidance in the more likely situation where one of the applicants was a preference entity.

The only sensible answer is that Congress did provide such a preference when it enacted the municipal preference.¹

3. The "Plain Meaning" Advanced By The Private Power Companies Leads To Absurd Results.

As the private power companies have acknowledged (PG&E Pet. 69a), if their position is accepted, a municipality which is the original licensee seeking a new license would not enjoy a relicensing preference. The Commission found it "absurd to believe that Congress gave the States and municipalities *not in possession* a preference against citizens and corporations not in possession, without also giving States and municipalities *in possession* the same preference against citizens and corporations not in possession." (*Id.*) Thus, under the interpretation advanced by the private power companies, a municipality in possession is placed in an inferior position compared to the one it would enjoy if it were a newcomer to the project seeking a new license in competition with other newcomers. Under their view in such a situation a state or municipality — for whose benefit Congress enacted the preference — with an original license would have a lesser chance of obtaining a new license than if it had never held a license in the first place. The private power companies, e.g., the Hydro Group (Pet. 20), contend that such a result is not absurd.

¹ The Commission (PG&E Pet. 68a) concluded that "the second preference [of Section 7(a)] would be applicable to competition between States and municipalities *inter se*, as well as among citizens and corporations *inter se*. The first, or municipal preference would continue to be applicable to competition between States and municipalities, and citizens or corporations, completing the coverage of all the possible combinations of competitors." Thus, the Commission found that Section 7(a) provided a preference, either mandatory or discretionary, in all relicensing situations. The interpretation by the private power interests, however, would provide the Commission with no guidance only in the situation which Congress regarded as most likely to occur.

The Hydro Group indicates (Pet. 20), albeit in an attenuated form, that the original licensee does not need a statutory preference at the relicensing stage to obtain a new license if its past operation and future plans conform to the standards of the Act. In short, the private power companies believe that the original licensee must always possess the advantage provided it has not acted improperly. As they stated below (Brief of the Hydro Group to the Court of Appeals at 19-20), "the holder of an expiring license would have a natural preference on relicensing." Thus, to avoid the conclusion that their plain meaning interpretation leads to absurdity, the private power companies now create a natural preference enjoyed by the original licensee which is not expressed anywhere in the Act and which in more limited form had been stricken from the bill in the drafting process (PG&E Pet. 33a). Even assuming, *arguendo*, such a natural preference, the construction advanced by the private power companies would still leave a municipality holding the original license materially disadvantaged since it would no longer enjoy the right to make its plans "equally well adapted." Moreover, as the discussion in the Petition of Utah Power (at 17-20) convincingly demonstrates "The Municipal Preference Provides Significant Competitive Advantages."

B. The Historic Record Establishes That The Federal Water Power Act Was Intended And Understood To Provide A Municipality With A Preference On Relicensing Against An Original Nonpreference Licensee.

The cursory attacks contained in the petitions on the use of historical materials by the court of appeals and the Commission do not even begin to respond to the massive materials put before the Commission, relied upon by the Commission and concisely employed by the court of appeals.¹

¹ The petitioners main objection to the court's discussion of legislative materials, e.g., Utah Pet. at 24, 26-27; PG&E Pet. at 14, 15; Hydro Group Pet. at 19, is that the court "ignored entirely" the "clear and compelling evidence" of the "repeated and consistent usage of the term 'new licensees.'" (Utah Pet. at 26-27). But, since that "fact" is irrelevant in interpreting the decisive words "in issuing," the alleged "failure" is equally irrelevant. See discussion at 4-8, *supra*.

In their Joint Brief to the court of appeals, the public power entities devoted over 60 pages (80-142) to an extended discussion of the historical record. That document responded to every argument raised by the private power companies. A careful review of the points now urged in their petitions indicated they raise no new arguments. The page limitations imposed upon this document preclude a full response now. In an attempt to provide the maximum information to this Court, we now summarize certain of the key items and provide references to the fuller treatment contained in the Joint Brief. These facts show that the Executive and the Legislature intended and understood that the Act provided municipal preference designed to apply in all relicensing situations, that the private power interests understood and accepted such a preference, that a learned district judge, who had himself been a senior member of Congress during the formative period of the legislation, concluded in 1922 that the Act provided such a preference, and that the initial statements of the newly-formed Federal Power Commission recognized the full extent of the preference. Taken alone, any single item outlined below would constitute compelling evidence of the legislative intent. Taken together, they are conclusive.

In considering certain of the points, the realistic impact of the positions taken by the contending interests must be evaluated. The full preference claimed by the public power interests means that when the plans of competing applicants are equally well adapted the preference entity will, if the license is to be granted, receive the license. Furthermore, if the filed plans of another applicant are initially superior, the preference entity must be given the opportunity to match the plans of the other applicant and, if it succeeds in matching those plans, it is to obtain the tie-breaking preference. The preference contended for by the public interests is obviously an extremely valuable right. The probability of municipalities seeking to exercise such a right would explain the repeated references by Administration figures, legislators and the early Federal Power Commission, as well as representatives of the private power interests, to the prospect of widespread municipal ownership of licensed hydroelectric projects after 50 years (see pp. 17-19, 22 *infra*).

It would also explain the exhaustive legislative struggle and the hundreds of pages of testimony and congressional deliberations over the financial compensation to be received by the original licensee in the event of recapture.¹

The private power interests, in contrast, describe a preference that is without practical significance. According to them, municipal preference is not applicable "against an original licensee seeking to relicense his existing project" (e.g., PG&E Brief to the court of appeals at 11). Thus, municipal preference, according to the private power interests, is applicable only when the original licensee is not seeking a new license—in short, when the original licensee has concluded the project is worthless. Even in that situation, before the preference could assume any value, another nonpreference applicant must be competing with the preference applicant for the acquisition of the worthless project.

The private power interests cannot explain why their valueless preference was, somehow, of such importance that it would be mentioned, let alone emphasized by, e.g., Merrill in his memorandum to the President (Item 7, *infra*), Congressman Lee in his summary of the Act to the House (Item 6), Merrill in his short 1920 magazine article (Item 8, *infra*) and by the full Commission in 1926, with the approval of the Department of Justice (Item 10, *infra*). The limited preference which the private power interests say was created is also totally inconsistent with the general expectation that in 50 years many states or particularly municipalities would obtain the licensed projects (see Item 4, *infra*).

¹The prospect of recapture by the United States under Section 14 could not explain the deliberations over compensation to be paid on recapture. It was widely recognized that the United States could only exercise its rights under Section 14 to recapture hydroelectric facilities if it were to utilize them for public purposes. Public purposes at that time were considered to be extremely limited and the prospect of recapture and use by the United States was considered remote. See the discussion on recapture by the United States appearing in Federal Power Commission, *Sixth Annual Report (1926)*, summarized under Item 9, *infra*.

Item 1: *The Wilson Administration from 1914 on supported full municipal preference on relicensing.* (For a fuller discussion see Joint Brief 60-69).

Senate Report No. 898, 63rd Cong., 3d Sess. (1915) contained the views of Secretary of the Interior Lane, who, speaking for the Wilson Administration, stated (at 11):

Careful consideration has been given to the question of what period should be covered by such a permit or agreement, and the general consensus of opinion seems to be that 50 years is the proper one, having in mind the rights and interests of all concerned. *This, subject to renewal in the event that the Government and State or the municipality does not desire to take over the plant at the expiration of the original permit period, or for good and sufficient reasons it be not found advisable to renew the permit to the original permittee.*

The Administration, through Secretary Lane, was clearly stating that states and municipalities must have the right to take over a licensed hydroelectric plant at the termination of the initial 50-year term. The quoted paragraph clearly indicates that a nongovernmental licensee was not expected to obtain renewal if a state or municipality desired to take over the project.

The same thought was expressed more succinctly by O.C. Merrill, the principal Administration spokesman on water power, in his 1914 testimony (Hearings on H.R. 14893 before the House Committee on Public Lands, 63d Cong., 2d Sess. 417 (1914) ("1914 House Hearings")):

With respect to the matter of renewal, I believe that provision should be made in any lease granted that the original lessee should have the right to renew except under two conditions, first, when the site is needed for public purposes, either by the nation, by a State, or by a municipality; second, when the lessee refuses to accept at the time of renewal, the conditions imposed on all other lessees.

Merrill was clearly stating that if a state or municipality seeks the project for public purposes, it, and not the original lessee, is to receive the lease [license].

Item 2: *Merrill's original memorandum of the principles that were to be embodied in the Administration bill included the principle of full municipal preference on recapture.* (For a fuller discussion and citations see Joint Brief 70-74).

Merrill drafted, on October 31, 1917, a "Memorandum on Water Power Legislation." The first page of that memorandum contains a handwritten notation: "This is the memorandum which led up to the preparation of the bill now before Congress." That memorandum stated in pertinent part (PG&E Pet. 32a-33a):

At the termination of license United States to have right to take over the plant or plants covered by the license, or to transfer them to a State or municipal corporation applying therefor, upon payment of compensation to the original licensee; otherwise the original licensee to have preference right to renewal of license upon compliance with the conditions prescribed by then existing law and regulations.

Licenses should terminate at the end of the fifty-year period in order that the United States may at that time dispose of the privileges as the public interest and the law and regulations then existing may require. In such disposition the order of preference should be as follows: (1) the United States — to acquire properties and operate them for Governmental purposes, (2) the State or municipality — to acquire the properties and operate them for municipal purposes, (3) the original licensee — to secure renewal of the license under conditions prescribed by then existing law and regulations, (4) any other applicant — under similar conditions. These provisions will leave the way open for future public ownership and operation if the experience of the next fifty years shall have established

the wisdom of such a policy. In any event, freedom of action in this respect should not be fore-closed by legislation at the present time.

As the Commission stated:

The memorandum was submitted to and approved by Secretary of Agriculture Houston, and submitted by him to President Wilson. The President approved the memorandum and gave instructions to the three Secretaries to draft a water power bill in accordance therewith.

(PG&E Pet. 33a).

Thus, it is clear that at its inception the Administration bill was intended to grant to states or municipalities a preference on relicensing. Thereafter, Merrill drafted a bill which granted a general discretionary licensing preference to states and municipalities and further provided that "the original licensee shall have a preference right over any other applicant therefor except a State or a municipality" (PG&E Pet. 32a). That quoted proviso was removed from the Administration bill prior to its introduction in Congress. However, in the Commission's language, "It is clear that Section 7 as introduced provided a discretionary suggestion of choice in favor of States and municipalities in all relicensing, as well as in all initial licensings" (PG&E Pet. 34a). That provision in Section 7 read (*Id.*):

That in issuing licenses hereunder, the commission may in its discretion give preference to applications for licenses by States and municipalities for developing power for State and municipal purposes, provided the plans for the same are deemed by the commission to be adapted to conserve and utilize in the public interest the navigation and water resources of the region. . . .

It was this bill which, as summarized in the next item, was understood by the representatives of the private power interests to provide for a state or municipal relicensing preference against the original licensee.

Item 3. *At the first and only extended congressional hearing on the Administration's water power bill in 1918, representatives of the private power interests clearly indicated recognition of a full municipal preference on relicensing.* (For a fuller discussion and citations see Joint Brief 81-105).

During the 1918 hearings held before the House Committee on Water Power, representatives of the private power sector acknowledged their recognition of the fact that full municipal preference rights on relicensing were contained in the Administration bill. They did not take issue with this concept, but were primarily concerned with the right of an original licensee to compensation in the event of take over.

For example, the witness for the Pacific Gas and Electric Co. testified:

. . . If he [the original licensee] is making a paying business out of it the Government will undoubtedly give preference at the end of the time, if he is making good profit on it, to a municipality or somebody else who might want it and whom the Government preferred. . . .

(Hearings Before the House Committee on Water Power, 65th Cong., 2d Sess. 236 (1918). ("1918 House Hearings") (emphasis added)).

The significance of the acquiescence of the water power interests taken together with the Administration's strong support for the full preference right of municipalities was that there was no remaining opposition to the principle. With the acquiescence in that principle by the private power interests, who were far more concerned with obtaining legislation that would permit them to profit from hydroelectric facilities for an initial period of 50 years than they were with their vulnerability at the end of 50 years to a takeover, there was no organized group with an interest in preventing full municipal preference on relicensing.

- Item 4.** *Witnesses representing the private power interests before the house water power committee in 1918 expressed their expectation that, at the expiration of 50 years, new licenses issued under section 15 would be obtained by states and municipalities and not the original licensees. (For a fuller discussion see Joint Brief 106-08).*

During the 1918 hearings of the House Committee on Water Power, witness after witness representing the private power interests stated their expectation that at the end of 50 years a good many states and municipalities, rather than original licensees, would obtain the new licenses. A representative exchange occurred between Congressman Haugen and Mr. Krauthoff:

Mr. HAUGEN. I think it is generally agreed there would not be any recapture; I do not think the Government is going to take any of these plants over.

Mr. KRAUTHOFF. According to my judgment as a bond man, I would seriously question whether in 50 years a good many States or municipalities would not recapture under the licensee provisions of the bill. The present trend is in that direction.

(1918 House Hearings at 439.) Coupled with the expectation that states and municipalities would receive the new license in 50 years was a recognition both by members of the Committee and witnesses representing the private power interests that the United States was unlikely to exercise its rights under Section 14 to retake the properties for its own use.

The very extensive Congressional discussion and debate (which occupies most of the two volumes of Dove¹) as to the compensation to be paid to an original licensee if its project

¹E. Dove, *Legislative History of the Recapture Provisions and the Net Investment Concept of the Federal Power Act* (2 vols. 1966) is an 848-page compilation (typically photocopied) of relevant extracts from the legislative history prepared for the Commission by an attorney on its staff. It includes a few mechanical comparisons.

was taken over was necessary precisely because of the general expectation that the matter of compensation had to be dealt with in order to assure investors that they would not lose their net investment and that it would be returned to them when, at the end of 50 years, states and municipalities successfully exercised their preference rights.

Item 5. *The Senate amendment adding the words at issue to Section 7(a) was designed to clarify an already existing full municipal preference on relicensing.*
(For a fuller discussion see Joint Brief 115-26).

The addition by the Senate Commerce Committee of the words "in issuing licenses to new licensees under Section 15 hereof" was suggested by Gifford Pinchot, the politically influential president of the National Conservation Association, in his letter of June 25, 1919 to Senator Wesley L. Jones, Chairman of the Senate Commerce Committee. Pinchot wrote (PG&E Pet. 42a - 43a):

The obvious intention of Section 7 is to give preference to States and municipalities; and you will not be accomplishing this purpose surely, unless you insert after the word 'issued' in line 11, page 12, of your bill, the words 'and in issuing licenses to new licensees under Section 15 hereof,' or word [sic] of like import.

Note that Pinchot is asserting a fact — the obvious intention of Section 7 is to give a full preference to states and municipalities. In plain language, Pinchot is pointing out that Section 7 was intended to confer a full preference on relicensing and that Congress would not be accomplishing this purpose "*surely*" unless it added the language he suggested or words of like import.

This interpretation is strengthened by Senate Report No. 180¹ which (at 1) stated that most of the amendments it made to the House bill were ". . . of a minor character and largely make more clear and certain the meaning of the House

¹Report of Senate Commerce on H.R. 3184, S. Rep. No. 180, 66th Cong., 1st Sess. (1919).

provisions." The House Report on the amendment described it as "clarify[ing]."¹ These official descriptions are accurate only if the bill, before the amendment contained a municipal preference on relicensing.

Item 6. *Immediately before the final House vote on the water bill in 1920, Representative Lee, a member of the Conference Committee, informed the House of Representatives that states and municipalities were given a full preference on relicensing.* (For a fuller discussion see Joint Brief 127-28).

After the Senate-House Conference Committee had resolved differences between the bills that had passed each body, Representative Lee informed the House on the very day that it took its final vote on the bill:

In the development of water powers by agencies other than the United States, *the bill gives preference to States and municipalities over any other applicant, both in the case of new developments and in the case of acquiring properties of another licensee at the end of a license period.*

59 Cong. Rec. 6527 (May 4, 1920) (emphasis added). No Congressman or Senators intimated any contrary view.

Item 7. *Merrill's memorandum to President Wilson informed the President that states and municipalities enjoyed a full preference on relicensing.* (For a fuller discussion see Joint Brief 129-33).

Shortly before he signed the Federal Water Power Act, President Woodrow Wilson received from its principal architect, O.C. Merrill, a memorandum which clearly stated that the Act provided for municipal preference on relicensing:

The United States has the first right to develop any power project, and it may exercise this right at any time, for any purpose, and to any extent that

¹ H. Rep. 910, 66th Cong., 2d Sess. 8 (1920).

Congress may approve. For development by agencies other than the United States, preference is given to States and municipalities. *A similar preference is given for the acquisition of the properties of other licensees at the end of the license period.* (Emphasis added.)

O.C. Merrill, Memorandum on Water-Power Bill, H.R. 3184 (June 9, 1920) (see PG&E Pet. 45a-46a).

Note Merrill's explanation is unequivocal. It contains no indication of any limitation of the preference that would make it inoperative against an original licensee. Merrill's memorandum evidences no hesitation or doubt and contains no indication that the legislation could possibly have been intended to have or to be construed to have a different reading. This most informed official¹ is stating a fact, not resolving a dispute or ambiguity. Note, further, this memorandum, written after the conclusion of all congressional action, was to assist the President in his task of deciding whether to sign or to veto the Act.²

Item 8. *In November, 1920, Merrill, as Executive Secretary, the highest ranking full-time official of the Federal Power Commission, publicly declared that there was a full municipal preference on relicensing.* (For a fuller discussion see Joint Brief 134-37).

In a three-page article Merrill wrote (Merrill, *Benefits Accruing to Municipalities Through the Federal Water Power Act*, 23 *The American City* 476 (November, 1920) (emphasis added)):

States or municipalities are given preferences in obtaining licenses and, with the exception of

¹ See, e.g., *United States v. Public Utilities Commission of California*, 345 U.S. 295, 305 n.10 (1953), where his testimony is cited as representative of the views of the Secretaries of Agriculture, Interior, and War.

² There had been vetoes of water power enactments by Presidents Roosevelt and Taft. The real possibility of a veto by President Wilson had been suggested during the legislative process. See *The Water Power Bill*, *Washington Post*, June 11, 1916. The President's decision to sign or veto the bill must be viewed as a crucial part of the legislative process.

Government dams, are not required to pay rental charges for any power developed which is sold to the public without profit or is used for State or municipal purposes. States and municipalities are also preferred applicants for sites on which licenses have expired and may purchase the properties on the same terms as the United States itself.

While no one can safely predict the trend of public ownership in the next fifty years, it is probable that the agency through which the public will most often act will be either the municipality or the state. Insofar as Federal legislation can do so, the Water Power Act provides the medium through which these agencies can secure the right to make use of the power sites under Government control. . . .

This statement is completely incompatible with the interpretation now put forward by the private power interests. A limited preference, of utility only if the original licensee regarded the project as worthless and did not choose to seek relicensing, certainly could not be described as "providing the medium through which those [preference] agencies can secure the right" to a license "insofar as Federal legislation can do so."

Item 9. *In 1922, United States District Judge Clayton (better known for his legislative role in the passage of the Clayton Act) unequivocally stated that there was a municipal preference on recapture against the original licensee. (For a fuller discussion, see Joint Brief 137-38).*

United States District Judge Clayton declared:

In further regard to the scope of the [Federal Water Power] act, the national policy expressed in it is that the United States may at the expiration of 50 years take over any water project constructed under the act, and that if the United States does not at the end of such period take over the project *the state or municipality under section 7 is given the preferential right over the original licensee to a renewal of the license.*

(*Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, 617 (M.D. Ala. 1922) emphasis added). This contemporaneous interpretation of the Act by a learned judge, who was in a unique position because of his prior role as a congressional leader during the formative period of the legislation, is obviously entitled to great weight.

Item 10. *In 1926, the Federal Power Commission and the Department of Justice approved a statement as to the importance of Section 7 in connection with the recapture provisions of Section 15 which is consistent only with the creation by Congress of a full preference upon relicensing and is totally inconsistent with the interpretation advanced by the private power interests.* (For a fuller discussion see Joint Brief 139-41).

As appears in the Sixth Annual Report of the Federal Power Commission (1926) at 160-65, the Commission approved a letter for dispatch to the Honorable Charles Evans Hughes, who represented the State of New York, in which it expressed its "views." That letter had previously been referred to and approved by the Department of Justice. That Commission, composed of President Calvin Coolidge's Secretaries of War, Interior and Agriculture, men who would not ordinarily be assumed to be hostile to the interests of private investors, pointed out that it was "the opinion of the Commission" that the provisions of Section 14 of the Federal Water Power Act were not intended to be of themselves a grant of authority to the United States to acquire property. The Commission pointed out that unless Congress through constitutional amendment received authority to acquire property for other than governmental purposes, it could not exercise its rights under Section 14 except in those extremely limited instances in which the United States itself would utilize the hydroelectric power for its own governmental purposes. Thus, the Commission declared:

The most important provisions of the Act with respect to recapture are, in fact, those contained in Section 15, which, in connection with the preference

prescribed by Section 7, afford a means whereby the States and political subdivisions or agencies of the States may acquire, under terms not otherwise likely to be available, private properties maintained under license.

This nearly contemporaneous interpretation of the Act by the Commission, in a statement which had been "referred to and approved by the Department of Justice," supports only the interpretation that states and municipalities were granted a full preference on recapture. If the preference were as limited as the private utilities maintain, it would be as a practical matter useless. Municipalities would enjoy a preference only in those instances where the original licensee regarded the project as worthless and, therefore, did not seek relicensing *and* where another nonpreference applicant also sought this worthless license. It would be impossible to regard a provision which as a practical matter would be virtually useless, as the most important provision of the Act with respect to recapture or to state that it would permit the preference entities to acquire, under terms otherwise not likely to be available "private properties maintained under license."

Item 11. *There are no contemporaneous statements whether by Congressmen, administration officials, the Commission, the courts, or even spokesmen for the industry indicating that Section 7 was intended to or did confer only a limited preference on relicensing.*

It was understood when the Act was passed that it conferred upon municipalities a full preference on relicensing. The absence of controversy on this point becomes clearest when the facts summarized in the first ten numbered items in this section are contrasted with the complete lack of citations by the private power companies to any statements indicating that Congress intended to confer or did confer only a limited preference on relicensing. In interpreting Section 7, this Court is not being called upon to deal with a disputed interpretation, but one which originally was clear to all informed parties. The representatives of the private water power interests recognized

the congressional intent to confer a full preference on relicensing and they accepted the full preference. There was literally no contemporaneous dispute over the fact that Congress enacted such a preference.

CONCLUSION

For these reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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May 18, 1983

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DEANER L. STEVAS,
CLERK

Nos. 82-1312, 82-1345, 82-1346

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY, *et al.*, *Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

ALABAMA POWER COMPANY, *et al.*, *Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*.

PACIFIC GAS AND ELECTRIC COMPANY, *et al.*, *Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*.

On Petitions For A Writ Of Certiorari To The
United States Court Of Appeals For The Eleventh Circuit

**BRIEF OF RESPONDENT CLARK-COWLITZ
JOINT OPERATING AGENCY IN OPPOSITION**

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the Federal Energy Regulatory Commission's construction of the Federal Power Act that in issuing new hydroelectric project licenses after the expiration of an initial license term, the Commission must apply the state and municipal preference specified by section 7(a) of the Act in all cases in which it determines that the state or municipal license application is as equally well adapted in the public interest as the competing applications.

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**On Petitions For A Writ Of Certiorari To The
United States Court Of Appeals For The Eleventh Circuit**

**BRIEF OF RESPONDENT CLARK-COWLITZ
JOINT OPERATING AGENCY IN OPPOSITION**

Respondent Clark-Cowlitz Joint Operating Agency (CCJOA)² respectfully requests that this Court deny the

¹ The American Public Power Association, the Clark-Cowlitz Joint Operating Agency, the City of Bountiful, Utah, and the City of Santa Clara, California, were intervenors in the court of appeals.

² The CCJOA is a municipal corporation under the laws of the State of Washington (Wash. Rev. Code § 43.52 (1974)), formed jointly by

petitions for a writ of certiorari,³ seeking review of the Eleventh Circuit's opinion in this case.

STATUTE INVOLVED

The case involves an interpretation of certain language in Part I of the Federal Power Act (the Act), formerly known as the Federal Water Power Act, 16 U.S.C. § 791. Portions of the Act are reprinted in Utah Power App. 101a-117a. The specific language in question appears in section 7(a) of the Act, 16 U.S.C. § 800(a), set forth in full below:

In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section [15] the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to

Public Utility District No. 1 of Clark County, Washington, and Public Utility District No. 1 of Cowlitz County, Washington. The CCJOA is a municipality within the meaning of section 3(7) of the Federal Power Act, 16 U.S.C. §§ 791, 796(7) (1976 & Supp. V 1981).

³ Petitions have been filed by Utah Power and Light Company, *et al.* (Utah Power), Alabama Power Company, *et al.* (Alabama Power) and Pacific Gas & Electric Company *et al.* (PG&E). In addition, a brief for respondent Federal Energy Regulatory Commission (FERC) has been filed which recommends grant of the petitions for the limited purpose of remand. Our references in this brief to the petitioner's appendix shall be to that of Utah Power, which was the first to be filed in this case.

develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

STATEMENT

The delay in filing this opposition has been occasioned by two extensions of time requested by the Commission, during which it decided in executive session to ask the Solicitor General to request this Court to grant certiorari for the purpose of remanding the case to the Commission. The Solicitor General acceded, but only in part, and is suggesting remand to the Eleventh Circuit. We oppose certiorari and remand of any description. The Commission correctly decided the reach of the statute three years ago. It argued that construction vigorously in the court of appeals and was upheld in a unanimous opinion. Substantial and expensive action in reliance on the Commission opinion has been taken by several entities, including CCJOA and the Commission itself.

We think a brief reference to the framework below will assist the Court in its consideration of the unusual, and we think totally inappropriate request for remand. We turn first to that framework, and then to the reasons for denying the writ.

1. Statutory Framework

Under Part I of the Act Congress has vested in the Federal Energy Regulatory Commission (successor to the Federal Power Commission) the authority to license the development of water power projects on waters or lands over which the federal government has jurisdiction. The statutory scheme governing that agency function is straightforward.

The statute provides certain minimum standards against which the Commission, in issuing licenses, must

assess all applications. 16 U.S.C. § 803. The statute further provides guidelines governing the Commission's choice of a licensee where there are competing applications for the same license. 16 U.S.C. § 800. In particular, section 7(a) directs that applications by states and municipalities shall be preferred if they are otherwise equally well adapted, in the Commission's judgment, to serve the public interest. *Id.*

The Commission may issue a license only for a limited term (up to 50 years). 16 U.S.C. § 799. Upon expiration of a license the Federal government may take over a project for its own use, 16 U.S.C. § 807, or through the Commission, may issue a new limited term license—either to the original licensee or to a new one. 16 U.S.C. § 808.

This case involves the statutory criteria governing the selection among competing applicants for a new license at the expiration of the old. The question is whether the Commission is to apply the preference in favor of states and municipalities in every case where there are competing applicants for a new license, or whether, as petitioners contend, that preference applies only in limited circumstances, namely when the original licensee is not seeking a renewal.

2. Proceeding Before The Commission

Upon expiration of a hydroelectric project license originally issued to Utah Power & Light Company, the City of Bountiful, Utah, and UP&L filed competing applications for the new license. Bountiful, a publicly-owned utility or "municipality" within the meaning of the Act, 16 U.S.C. § 796(7), asked the Commission to issue a declaratory order clarifying its entitlement to the statutory preference.

The Commission initiated a generic proceeding, expressly limiting its inquiry to the legal issue of statutory construction. As the Commission stated (Utah Power App. 24a):

[T]he principal question to be decided is not the policy issue of whether it is factually or politically wise for States and municipalities to have a relicensing preference . . . but the legal issue of whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920.

After extensive briefing and oral argument, the Commission issued its Opinion No. 88 declaring that in issuing new licenses the preference applied in favor of states and municipalities whether or not the original licensee was among the competitors. *Id.* The Commission further found that the state or municipal applicant competing for a new license was entitled to a preference only after the Commission determines that the plans of the state or municipality are, in the language of section 7(a), "equally well adapted." *Id.* The Commission characterized the preference as a "tie-breaker rule." *Id.* at 74a.

3. The Court Of Appeals' Decision

The court of appeals affirmed, holding that the preference "applies in all competitive relicensing cases, not just those where the original licensee is not an applicant." *Id.* at 13a. The court found the Commission's construction "consistent with the statute's language, structure, scheme, and available legislative history," and gave deference to the agency's statutory interpretation absent "compelling indications that it is wrong." *Id.*

The court further held that the preference only applies "in a tie-breaker-situation" (*id.*), a fact considered by the court before it concluded that this case was ripe for review. *Id.* at 6a. The court went on to resolve the legal

issue because, consistent with the Commission's representations, such resolution would "foster effective enforcement and administration by the agency." Utah Power App. 7a.

Rehearing was denied by a unanimous court. *Id.* at 83a.

4. Subsequent Events

The Commission has proceeded toward assessing the merits of competitive relicensing cases consistent with its directive in Opinion No. 88 that "[t]he processing and consideration of the pending applications [competing for new licenses] should go forward in light of this declaratory order." *Id.* at 78a. Thus far one such case, involving the competing new license applications of the Clark-Cowlitz Joint Operating Agency and Pacific Power & Light Company for Merwin Dam in Washington State, has been through adjudicatory hearing. That "Merwin" case, set for hearing by the Commission in September 1981, was recently decided by an administrative law judge,⁴ and is presently pending before the Commission.

In the past few weeks, "a majority of Commissioners" decided, in closed session and for reasons not made public, to reverse FERC's posture with respect to the correct interpretation of the Act. FERC Br. 8. Accordingly, the Commission asked the Solicitor General to recommend "that the Court grant the petitions for certiorari, vacate the judgment of the court of appeals, and remand the case to that court with instructions to remand to the Commission for further consideration." *Id.*

⁴ *Pacific Power & Light Co. and Clark-Cowlitz Joint Operating Agency*, 23 FERC (CCH) ¶ 63,037 (April 28, 1983).

REASONS FOR DENYING THE WRIT

The question presented is strictly a legal one, posited by the Commission itself, which was correctly decided. The decision is not in conflict with any other court holding. Moreover, the court of appeals' narrow holding—affirming the application of a statutory preference which comes into play only upon the Commission concluding after adjudication that two competing applications are equal—does not merit this Court's attention; nor does the last-minute reversal of position by the new Commissioner's dictate otherwise.

1. The Court Of Appeals Employed Settled Principles Of Statutory Construction In Correctly Interpreting The Act

The principles invoked to resolve the single question of statutory construction presented here are not out of the ordinary. FERC was confronted with two conflicting interpretations of section 7(a) of the Act. The Commission, construing a statute with which it has had over sixty years' experience, chose the interpretation that makes sense on its face, is consistent with the overall statutory scheme, avoids absurd results, and is exclusively and convincingly sustained by the legislative history. The court of appeals, after independently confirming the Commission's conclusion, unanimously affirmed.

a. Petitioners and respondents offered the court of appeals (and the Commission below) differing interpretations of the following language of section 7(a):

in issuing licenses to new licensees under Section 15 hereof the Commission shall give preference to applications therefor by States and municipalities. . . .

Respondents urged that the key to understanding the quoted language lies in its initial phrase—"in issuing licenses"—which means "in determining whether to issue

licenses." Respondents therefore offered the following construction of the language in question (R.1202):

in determining whether to issue licenses to new licensees under Section 15 hereof the Commission shall give preference to applications therefor by States and municipalities.

Under this reading, the preference applies to the decisional process whenever a "new licensee" is among the competing applicants; that is, in every competitive relicensing situation (for every competitive relicensing case will include a potential new licensee). Thus, in determining whether to issue a license to a new licensee under Section 15—a potential inherent in *every* competitive relicensing situation—the Commission shall give preference to states and municipalities. The foregoing argument, specifically made by the Commission itself in the court of appeals, means in short that upon relicensing, if there is a competing municipal applicant the preference must be applied.

Petitioners have differed among themselves as to the meaning of the language in question. At one point one of the petitioners urged, consistent with respondents, that the words, "In issuing licenses to new licensees under Section 15" meant "In determining whether to issue licenses to a new applicant under Section 15." R.1285. At other points petitioners have simply ignored the phrase "in issuing licenses" and read section 7(a) as though it said:

in issuing licenses to new licensees under Section 15 hereof, the Commission shall give preference to applications therefor by states and municipalities "only

against applicants seeking the right to operate an existing project for the first time.”⁽⁵⁾

Those last fifteen words are not in the Act, and there is no reason to read them in.

As a general proposition petitioners all read the language in question as conferring a preference which applies “against” a limited class. Thus they view the reference to “new licensee” as meaning that the preference applies “solely against applicants *other than* ‘original licensees’.” Utah Power Pet. 4.

There is no reason to read the language petitioners’ way, as limiting the entities which the preference would affect.⁶ We have shown above that the words “in issuing licenses to new licensees under Section 15 hereof” simply identify the circumstance in which the preference applies—*i.e.*, in the process of determining whether to issue a license to a new licensee. The preference applies whenever the Commission considers competing applications under section 15; there is no exception which *ipso facto* cancels the preference whenever the original licensee chooses to apply again.

⁵ The portion enclosed in quotations is from Utah Power’s initial brief to the court of appeals (Ct. App. Br.) at page 10. PG&E’s position was similar. It read the section 7(a) language as saying (PG&E Ct. App. Br. at 11): “The municipal preference applies only against new licensees and not against an original licensee.” Alabama Power reached the same result (Alabama Power Ct. App. Br. at 4): “the relicensing preference in Section 7(a) does not apply against the original licensee.”

⁶ Indeed, petitioners’ reading reverses the natural sense of the word “preference.” By focusing on the object rather than the recipient, petitioners read the statute as if it conferred a narrow prejudice or disadvantage *against* a particular class of applicants rather than a broad preference *in favor of* states and municipalities.

In these circumstances the court properly found no basis for petitioners' claim that the construction of section 7(a) must be resolved their way without resort to anything beyond the face of the statute. See e.g., *United States v. Public Utilities Commission of California*, 345 U.S. 295, 312-13 (1953), where this Court looked to the statutory scheme and the legislative history in construing a much simpler term ("person") under the Act. The propriety of the court's (and the Commission's) rejection of petitioners' narrow "plain meaning" approach is underscored by the fact that the petitioners could not even agree among themselves on a construction.

b. The court of appeals further found that respondents' construction is consistent with the statutory scheme while petitioners' construction is not. Section 7(a) lays down the substantive standards governing the Commission's choice of applicants in three competitive licensing situations. "As to all three, the Act clearly gives two different preferences" (Utah Power App. 9a): 1) municipal applicants are preferred if their plans are found "equally well adapted" as those of competing private applicants, and 2) as between other applicants preference may be given to the applicant whose plans are "best adapted." *Id.* Under the construction of section 7(a) affirmed by the court of appeals, "those preferences cover all situations concerning competing applications" (*id.*), a natural and logical scheme.

Petitioners' interpretation distorts that natural scheme. Under petitioners' view, the Act's preferences apply only when the original licensee is not among the applicants. The result is that in any case in which the original licensee decides to compete the Act provides no standard for choosing among the competing applicants. The court, rejecting that on-again, off-again application

of the Act's preferences, properly refused to impute to Congress "a result which would cause administration of the Act by the Commission to be confusing and sporadic." *Id.* See *United States v. Powers*, 307 U.S. 214, 217 (1939) ("There is a presumption against a construction which would render a statute ineffective or inefficient . . .")

Moreover, petitioners' interpretation gives the standards of section 7(a) no practical application. Under their theory, the only occasion to apply section 7(a)'s standards on relicensing is when the original licensee chooses not to reapply. But as a practical matter that will happen only where the incumbent finds the project not worth operating further.⁷ Thus, as the court of appeals concluded, "states and municipalities realistically would have no preference at all because a preference to a losing project is worthless." Utah Power App. 10a. The court therefore followed long accepted principles counseling against a construction which renders inoperative major portions of the statute's terms. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

Finally, the court (and Commission) noted that petitioners' interpretation led to a patent absurdity. Under petitioners' theory the preference would operate with full

⁷ One petitioner attempts to illustrate how, notwithstanding its crabbed reading of the Act, "[t]he preference will apply to projects of 'worth.'" PG&E Pet. 24, n. 36. Two of its illustrations ((1) where the original licensee is ruled out by the Commission and (2) where the original licensee refuses to accept the Commission's license terms) are inapt. These assume the original licensee *is* an applicant, in which case section 7(a)'s preferences do not apply according to petitioners' reading of the Act. The other example (where a non-utility licensee chooses not to reapply) serves only to illustrate the point that petitioners read the preference as applying only in remote and far-fetched circumstances—hardly a likely basis for the detailed provisions of section 7(a).

force if a state or municipality entered a relicensing competition in which the original licensee had not applied; but the state or municipality which had itself been the original licensee would lose that preference if, as petitioners claim, the preference does not operate when the original licensee is involved in the competition. Neither the court nor the Commission could see any sense to an interpretation in which a state or municipal applicant would be prejudiced simply because it was the original licensee. Here again, well settled principles of statutory construction support the result reached. *United States v. Turket*, 452 U.S. 576, 580 (1981) ("[A]bsurd results are to be avoided and internal inconsistencies in the statute must be dealt with.")

c. Both the Commission and the court of appeals found that the legislative history of the Act supports only one conclusion—that section 7(a)'s preference puts states and municipalities above *all* competitors for a new license.

As originally introduced in Congress, the bill provided:

in issuing licenses hereunder, the commission may in its discretion give preference to applications for licenses by States and municipalities.

H.R. Rep. No. 715, 65th Cong., 2d Sess. 24 and 33 (1918).^{*} The preference applied broadly to "licenses" (initial and new licenses alike), and was unrestricted in terms of its

^{*} Subsequently the language was changed to make the application of the preference mandatory (" . . . the Commission shall give preference . . . ") rather than discretionary. 56 Cong. Rec. 9775 and 9804 (1918). Also, language was added to give states and municipalities a reasonable time to perfect their applications (" . . . or shall within a reasonable time be made equally well adapted . . . "). 58 Cong. Rec. 2037-38 (1920).

application "against" the original license. Mr. O. C. Merrill, a principal draftsman of that bill whose authoritative position was recognized by the 1918 Congress⁹ and subsequently by this Court,¹⁰ explained that preference language in contemporaneous memoranda. As he put it, "the order of preference should be as follows: (1) the United States . . . (2) the State or municipality . . . (3) the original licensee . . . (4) any other applicant" Utah Power App. 10a, n. 7. Moreover, as the court of appeals noted, testimony during the hearings on the bill confirmed that the original licensee stood behind states and municipalities in the order of preference. *Id.* at 11a, n. 8.

Following other changes in the bill, noted conservationist Gifford Pinchot proposed the language in issue to assure that section 7 accomplished its "obvious intention . . . to give preference to States and municipalities." Utah Power App. 12a, n. 9. Pinchot's language was included in the bill. Thereafter, Congressman Lee, a manager of the House-Senate Conference Committee, gave the following explanation of section 7(a)'s preference just before the bill's enactment:

In the development of water powers by agencies other than the United States, the bill gives preference to States and municipalities over any other applicant, both in the case of new developments and in case of acquiring properties of another licensee at the end of a license period.^[11]

⁹ See H.R. Rep. No. 715, at 14-15.

¹⁰ See *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 418, n. 24 (1975).

¹¹ 59 Cong. Rec. 6527 (1920) and see Utah Power App. 12a, n. 9. Congressman Lee's statement followed verbatim a memorandum prepared for him by O.C. Merrill. Mr. Merrill later prepared another

The foregoing represents only a fraction of the legislative history presented by respondents (including FERC) to the court of appeals. While it is true that the court said much of the material was "weak," it also characterized it as "helpful" (Utah Power App. 12a), and there is *no* legislative history supporting petitioners' view. The thousands of pages of bills, testimony, reports and Congressional colloquy contain no mention of the "limited preference" that petitioners suggest is intended. In fact, as the court of appeals points out, the "limited preference" concept which petitioners contend is embodied in the Act appeared in a different bill (the Shields bill) that was rejected by Congress in passing the Act. *Id.* at 11a.¹² In *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 178-79 (1946), this Court determined that Congress' rejection of a proposition expressly contained in the Shields bill was compelling evidence that the same proposition was not intended under the Act.

memorandum for the President's use, explaining the preference section of the bill as follows (Utah Power App. 12a, n. 9):

For development by agencies other than the United States preference is given to States and municipalities. A similar preference is given for the acquisition of the properties of other licensees at the end of a license period.

¹² Section 6 of the Shields bill, S. 1419, provided that upon expiration of the permit (*i.e.* license):

[1] [T]he United States may acquire, take over, and occupy all the property of the grantee . . . or [2] the Secretary of War may grant a new permit to the original permittee . . . or [3] the Secretary of War may grant a permit to another person . . . *subject to the restrictions and preferences herein provided . . .*

See 56 Cong. Rec. 225-26 (1917) (emphasis added). Shields' preferences operated only in the third case, the issuance of a license to "another person." The preferences did not operate against the "original" licensee—precisely the sort of limited preference that petitioners claim is intended under the Act.

2. The Court Of Appeals' Decision Is Consistent With The Decisions Of This Court And The Only Other Court To Have Previously Addressed The Language Of The Act At Issue

As this Court has found, the Act was the product of conservationists, *First Iowa v. FPC*, 328 U.S. at 180; *FPC v. Union Electric Co.*, 381 U.S. 90, 99 (1965), who strongly opposed potential monopolistic control over water resources by private interests in the form of perpetual licenses and who supported the preservation of the public's water resources for public control. See Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 Geo. Wash. L. Rev. 9, 12, 16 (1945), cited with approval in *First Iowa v. FPC*, 328 U.S. at 180, n. 23; *FPC v. Union Electric Co.*, 381 U.S. at 98, n. 11, and *Chemehuevi v. FPC*, 420 U.S. at 405, n. 10. Accordingly, the Act required limited-term licensing, 16 U.S.C. § 799 and see *United States v. FPC*, 345 U.S. 153, 169 (1953) ("Congress was of course aware that, by granting a license to private enterprise, the Federal Power Commission would not commit the site permanently to private development"); it established favorable provisions for public recapture, 16 U.S.C. §§ 807-808; it specifically outlawed monopolistic activities, 16 U.S.C. § 803h; and it permitted continuing state control over aspects of the public water resources "by careful preservation of the separate interests of the states." *First Iowa v. FPC*, 328 U.S. at 174, n. 19 (citing section 7(a)'s preference to states and municipalities as an example of the preservation of state interests.)

The interpretation of section 7(a) that gives states and municipalities a meaningful preference on relicensing after 50 years implements the foregoing general theme underlying the Act as found by this Court. Conversely, petitioners' interpretation is totally at odds; it effectively

eliminates the state and municipal preference in any meaningful sense on relicensing in favor of the perpetual licensing of the original private licensee.¹³

The only other court to have addressed the language of section 7(a)—Judge Clayton in *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, 617 (M.D. Ala. 1922)—described the preference from a contemporaneous view in unrestricted terms wholly consistent with the court of appeals' ruling:

In further regard to the scope of the [Act], the national policy expressed in it is that the United States may at the expiration of 50 years take over any water project constructed under the act, and that if the United States does not at the end of such period take over the project *the state or municipality under section 7 is given the preferential right over the original lessee to a renewal of the license.* [Emphasis added.]

¹³ Petitioners claim that their view of section 7(a) protects the original licensee's investment in the project much like the act seeks to protect the investment of preliminary permit holders. PG&E Pet. 23. It is true that Congress endeavored to protect preliminary permittees from the operation of the preference during licensing, because the permittees' pre-licensing investment would otherwise be jeopardized. See *Hearings on H.R. 8176 before the House Committee on Water Power*, 65th Cong., 2d Sess. 54-55 (1918). But the licensee is in no such jeopardy on relicensing, since it is entitled to a return of all investment, in addition to its profit, during the entire license term. See *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 242-43 (1954). The fact that Congress took the pains that it did to define compensation upon a license transfer evidences Congressional predilection in favor of such transfers and against petitioners' view that would have the Act perpetuate the original licensee's hold on the project. Indeed the legislative history inveighs heavily against any notion of a perpetual license, which is the end result of petitioners' position.

3. The Declaratory Question Decided Below Is Not An Appropriate Cause For This Court's Attention

a. Petitioners overstate the consequences of the court of appeals' decision.

Aside from challenging the accuracy of the court of appeals' decision, the petitions are all based on generally stated claims that the decision "has a significant adverse impact upon the investor-owned electric utility industry" Utah Power Pet. 13.¹⁴ Petitioners misstate the case.¹⁵

Their claims rest on the assumption that "[t]his case affects . . . every licensed project not already owned by a municipal electric utility." Alabama Power Pet. 10. The claim is vastly exaggerated. The preference issue has not even arisen in the overwhelming majority of relicensing cases to date. According to Commission staff figures, of 91 projects which have been relicensed or are presently

¹⁴ Another petitioner claims that the decision "places in substantial jeopardy" the continuing use of hydroelectric resources by privately-owned utilities. PG&E Pet. 8. And Alabama Power says: "At stake are billions of dollars of investment and future electric charges" Alabama Power Pet. 11.

¹⁵ Various *amici* offer this same overstated argument with form-letter repetition. For example, the Oregon brief states at page 3: "the practical economic effects of the lower court's decision are immense and adverse." However, in the Merwin proceeding the Oregon Public Utility Commissioner told a different story (Brief of Oregon Public Utility Commissioner at 3, *Pacific Power & Light Co. and Clark-Cowlitz Joint Operating Agency*, 23 FERC (CCH) ¶ 63,037 (April 28, 1983):

The Commission has held that the preference given to states and municipalities by Section 7(a) applies in all competitive relicensing cases. However, *this preference applies only as a "tie-breaker."* As to whether there is a tie to be broken, the Commission must first determine whether the plans of the state or municipality are "equally well adapted" [citations omitted]

up for relicensing only eight have involved competing applications by a municipality. *See* Utah Power App. 123a-124a.

Similarly overstated are the economic consequences which petitioners assume will result from this decision based on their theory that each "privately-owned utility . . . may be forced to replace its project with an expensive new thermal generating plant." Utah Power Pet. 15. *See also* PG&E Pet. 9. Petitioners fail to point out that there would be no need to replace capacity where the new licensee was previously served by the prior licensee or where, as in the Merwin case, there is a surplus of power available to that licensee.

In addition, such economic consequences as there may be were treated by the Commission as irrelevant to the strict question of statutory construction involved here. Utah Power App. 77a. For, in the end, no license has changed hands nor will any license necessarily change hands strictly as a result of the court of appeals' decision. The court of appeals (and the Commission below) made it clear that the state and municipal preference is to be applied only after the Commission first decides on the merits that the competing relicense applications are otherwise equal.

One petitioner suggests that application of the preference as a "tie-breaker" will nevertheless carry great significance because the Commission will "avoid the potentially time-consuming and difficult analysis necessary to determine if one applicant is better than another." PG&E Pet. 10, n. 15. But there is no reason to expect the Commission will shirk its responsibility under the Act. FERC has made no such suggestion; neither has it expressed any reservations about the difficulty of selecting a licensee under its view of the statute's standards. Quite

the opposite is true. The Commission pointed out that petitioners' interpretation would leave it without any section 7(a) standards to apply whenever the original licensee competed in a relicensing case. Utah Power App. 67a.

Far from decrying any administrative difficulty under its interpretation, FERC represented to the court of appeals that its resolution of section 7(a)'s meaning fostered administrative efficacy because it enabled potential relicensing applicants to proceed with some certainty in deciding whether to make application. FERC Ct. App. Br. 7, n. 4. Accordingly, the Commission has proceeded with the processing of the Merwin competitive relicensing case. Commenced in September 1981, that case has already gone through a complete adjudicatory proceeding before an administrative law judge, resulting in a very recent decision. As that decision makes clear, the entire case was bottomed on the Commission's prior interpretation of the Act and its directions to proceed. In these circumstances, review by this Court could only upset what is otherwise a settled administrative course.

Finally, in urging this Court to consider this case petitioners rely heavily on arguments that section 7(a)'s preference is bad policy. *See* Utah Power Pet. 13-20; PG&E Pet. 10.¹⁶ As the Commission made clear at the outset of this case, all that has been decided is what Congress established as the controlling policy and enacted into law.

¹⁶ Petitioners claim the court of appeals' decision "would give municipal systems a preference right that would enable them to take control at relicensing of the nation's privately operated hydroelectric projects, without demonstrating that the public interest would thereby be better served." PG&E Pet. 10; *See also* Utah Power Pet. 18. As we already demonstrated, such statements are flatly erroneous and plainly misread the opinions below.

"Whatever the merits of the [petitioners'] argument as a matter of policy, it is properly addressed to Congress, not to the courts." *Chemehuevi v. FPC*, 420 U.S. at 423.

b. The reversal of position by the new Commissioners offers no legitimate basis for this court's intervention.

The Commission unexpectedly reversed its position while the petitions for certiorari were pending, asking the Solicitor General to recommend that the Court grant certiorari, "vacate the judgment of the court of appeals, and remand the case to that court with instructions to remand to the Commission for further consideration." FERC Br. 8. The Solicitor General has not gone that far but does suggest remand to the circuit court "for such reconsideration as it deems appropriate in light of the intervening circumstances." *Id.* at 10. Neither of these extraordinary requests have substantive basis nor do they make practical sense.

(i) Significantly, the Solicitor General does not recommend remand to the Commission¹⁷ nor does he ever say that this case was wrongly decided below and for that reason deserves this Court's attention on the merits. Instead the Solicitor General requests this Court to vacate summarily the decision below and to remand to the court of appeals for reconsideration of "intervening circumstances." *Id.*

¹⁷ The Solicitor General exercises commendable discretion separating himself from the position of the new Commissioners. In view of the present Commissioners' obvious predisposition on the question ("a majority of the Commissioners appear to be ready to overrule Opinion Nos. 88 and 88A and adopt the contrary position." FERC Br. 9), a remand to the agency for "further consideration" would be an empty gesture that we think would serve only to undermine public confidence in the review process.

What intervening circumstances? There has been no new information discovered to shed new light on the statutory interpretation question at issue. Indeed, the government cites nothing in support of a changed result. Nor has there been any intervening change in the statute, any new law passed or any recent court holding inconsistent with the court of appeals' decision.

The only "intervening circumstances" are that a "majority" of the present Commissioners want to reach a different result. But there is nothing to indicate that this precipitate reaction by some new members is based on the same serious consideration as was given to Opinion No. 88.¹⁸ Moreover, as FERC itself makes clear, this case is still to decide what "the statute requires." FERC Br. I. That question of law is not one that depends on the view of any particular set of Commissioners. Rather, the question turns solely on the meaning of the Act and the intent of Congress in passing that Act. What the new Commissioners may prefer as a matter of policy can in no way advance that inquiry. *Chemehuevi v. FPC*, 420 U.S. at 423. As this Court has held, despite what an administrative agency may decide in interpreting its own statute, the courts are the final authorities on issues of statutory construction. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

In short, nothing of substance has intervened to warrant this Court's review, much less the extraordinary relief requested. This eleventh-hour maneuver by new

¹⁸ Opinion No. 88 was the result of months of consideration after voluminous briefing by the Commission staff, by "virtually all of the investor-owned utilities" (FERC Br. 8-9), and by the publicly-owned utilities, and after an extraordinary full day of oral argument before the entire Commission.

members to reverse a holding of law by the Commission, which it supported and had affirmed in the court of appeals,¹⁹ casts a cloud over agency decision-making and is an imposition on the judicial process. Here, as in prior cases, the effort should not be condoned by this Court. *See American Textile Manufacturers Inst. v. Donovan*, 452 U.S. 490, 504, n. 25 (1981); *Greene County Planning Bd. v. FERC*, 434 U.S. 1086 (1978) (see brief for respondent FERC).

(ii) Under the Solicitor General's approach this Court is asked to take jurisdiction over this case and give it sufficient consideration in order to determine whether the opinion should be vacated, only to remand the case so that the circuit court may consider it for yet a third time. At the end of that process, whatever the outcome, it may be assumed that further petitions to this Court would follow.

That proposal amounts to a senseless waste of time and resources, which frustrates the purpose underlying the case—to bring about certainty on the question of public preference on relicensing. The Solicitor General's proposal is particularly inappropriate in view of the substantial time and resources already expended in the site-specific relicensing proceedings, all bottomed on *Opinion No. 88's* holdings and directions to proceed.

¹⁹ As four of the present Commissioners represented to the court below (FERC Ct. App. Br. 7, n.4):

There is no reason why the purely legal question of statutory interpretation present here would be affected by the facts of a particular case, nor did the Commission indicate its legal conclusion might later change

CONCLUSION

For these reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 18 1983

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PACIFIC GAS AND ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT
CITY OF SANTA CLARA, CALIFORNIA

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May 18, 1983

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

Nos. 82-1312, 82-1345, 82-1346

UTAH POWER & LIGHT COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT
CITY OF SANTA CLARA, CALIFORNIA

REASONS WHY THE WRIT SHOULD BE DENIED

The City of Santa Clara here addresses only the extraordinary events which led to the current suggestion as to action by this Court filed by the Solicitor General in the document captioned Brief of the Federal Energy Regulatory Commission. The Brief in Opposition of Respondent City of Bountiful, Utah responds to the merits of the positions expressed in the Petitions for Certiorari filed in this proceeding. Santa Clara supports Bountiful's position on those matters.

The Federal Energy Regulatory Commission issued Opinion Nos. 88 and 88A (or "*Bountiful*") reported at 11 F.E.R.C. (CCH) Para. 61,337 and 12 F.E.R.C. (CCH) Para. 61,179,

respectively, on June 27, 1980 and August 21, 1980. The Commission issued its lengthy Opinion No. 88 based upon a study of the voluminous briefs and after a full day of oral argument. The Commission's decision was affirmed by the United States Court of Appeals for the Eleventh Circuit on September 17, 1982 after full briefing by all parties, including the Commission (which successfully urged affirmance).

The extraordinary events occurring at the Commission after the affirmance by the court of appeals are summarized at pp. 8 and 9 of the Brief for the Federal Energy Regulatory Commission ("FERC Brief") and have also been reported in general newspapers and the trade press in somewhat more detail. As judiciously phrased by the Solicitor General, at the conclusion of a closed meeting, "the Commission voted to request the Solicitor General to recommend to this Court that the Court grant the petitions for certiorari, vacate the judgment of the court of appeals, and remand the case to that court with instructions to remand to the Commission for further consideration" (FERC Brief at 8).

It should be noted that the Solicitor General does not suggest that this Court follow the request of the Federal Energy Regulatory Commission, apparently because, after reviewing the transcript of the Commission's closed meeting, which has been made available to him but denied to those parties which support Opinion No. 88, he could not in good conscience assert that the FERC would reconsider the matter without having prejudged the outcome. If there is any inclination to follow the suggestion of the Solicitor General, we respectfully suggest that it would be appropriate for this Court to request that the Solicitor General furnish copies of the transcript of the meeting at which the Commission decided to seek to obtain jurisdiction again so that it could overrule the previous Commission. The Solicitor General candidly states that "a majority of the Commissioners appear to be ready to overrule Opinion Nos. 88 and 88A and adopt the contrary position" (FERC Brief at 9).

The Solicitor General "urges the Court to grant the petitions for certiorari, to vacate the judgment of the court of

appeals, and to remand the case to that court for such reconsideration as it deems appropriate in light of the intervening circumstances" (FERC Brief at 10). The sole intervening circumstance relied on by the Solicitor General is that "a majority of the Commissioners, four of whom were appointed after the issuance of Opinion Nos. 88 and 88A, expressed their disagreement with the Commission's earlier position in these orders" and, "that a majority of the Commissioners appear to be ready to overrule Opinion Nos. 88 and 88A and adopt the contrary position" (FERC Brief at 8, 9).

The Commission in its Initial Order of May 3, 1979 establishing this proceeding stated that its inquiry into the Section 7(a) municipal preference would "be limited to . . . purely legal issues of statutory construction. . . ." (PG&E Pet. 23a.¹) In its Opinion 88, the Commission itself recognized that its role was "the same" as that of a court:

Within the framework of this proceeding established by our order of May 3, 1979, we view our present role as being the same as that of the District of Columbia Circuit in *Chemehuevi Tribe of Indians v. Federal Power Commission*, *infra*. In other words, the principal question to be decided is not the policy issue of whether it is factually or politically wise for States and municipalities to have a relicensing preference against citizen and corporation licensee-applicants, but the legal issue of whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920.

(PG&E Pet. 23a.) The Commission, by then comprising four of the five current Commissioners, urged and obtained from the United States Court of Appeals for the Eleventh Circuit an affirmance of its purely legal decision. The court of appeals began its opinion, "We are faced with a purely legal question regarding the statutory construction of section 7(a) of the Federal Power Act. . . ." (PG&E Pet. 1a).

¹ Citations to the opinions of the Commission and of the court of appeals below are to the separately bound appendix to the petition filed by Pacific Gas and Electric Company.

Now, the Commission, without benefit of oral argument, without any new briefs on the issue, without having jurisdiction to reconsider the merits, without, so far as appears, even seriously reviewing the prior briefs of those who supported Opinion No. 88, and without the thorough consideration of the former Commission, which included the intellectual discipline involved in producing an opinion, appears to have decided, in the words of the Solicitor General "to be ready to overrule" its prior decision and to "adopt the contrary position."

In these circumstances, it is readily apparent that the appointees of one administration, on the basis of unknown and almost surely procedurally improper representations to them, have belatedly decided, *dehors* a record, to overrule the considered opinion of a Commission appointed by a prior administration, although the issue is a purely legal one of the construction of a statute passed by Congress in 1920.²

The current Commission has not even favored this Court or the parties with any explanation of the legal basis of its current position.³ If the Commission succeeds in its goal (FERC Brief at 8) of having the matter remanded to it, it is easy to foresee the prospect that, after the Commission constructs some "legal" support for the overruling it has already determined upon, the matter will again be brought before a court of appeals. Whatever the decision of the court of appeals, the unsuccessful parties will undoubtedly seek certiorari from

²We submit that this explanation is the only one consistent with the sequence of events. However, if additional support is required, we point out that in referring to the *Bountiful* decision, the Director, Division of Public Information of the Commission has told the press "That decision was made during the Carter administration. . . . This is a different commission." Associated Press, Business News Section, carried over the AP Wire on April 29, 1983 (p.m. cycle) over the byline of Matt Yancey, on NEXIS. The four new Commissioners referred to by the Solicitor General were all appointed by the new administration.

³It is respectfully submitted that the Commission has not yet evolved a legal basis. It has, instead, reached an impermissible policy judgment reserved solely to Congress although it no doubt will, if successful in obtaining legitimate jurisdiction, construct some purported "legal" analysis to rationalize its current decision.

this Court. By that time, it is quite possible that the Commission may again be comprised of appointees of yet a newer administration and may, if permitted here to do so, seek to have the matter again remanded to it for reversal. Surely, a purely legal decision on the construction of a 1920 statute should not be allowed to be a perpetual weathervane swinging with the winds of each succeeding administration.

Santa Clara believes that the effective administration of law requires that after so many years the issue of whether there is a municipal preference on relicensing should be definitively decided.⁴

We believe that, for the reasons expressed in the Brief In Opposition of the City of Bountiful, Utah, the most appropriate method of resolution is denial of the Petitions for Certiorari. However, since the overwhelming interest of Santa Clara and other parties in its position is to secure expeditious finality,⁵ it

⁴The Solicitor General suggests that "The situation created by these new circumstances is especially delicate in view of the fact that the court of appeals, in interpreting the statute as it did, gave 'great deference' to the Commission's previous views. . . ." (FERC Brief at 9). However, immediately before its statement on deference, the court of appeals concluded "We have reviewed the Commission's interpretation of this statute and deem such construction consistent with the statute's language, structure, scheme, and available legislative history" (PG&E Pet. 13a). Obviously, there is nothing in the opinion of the court of appeals which suggests, nor could it logically be suggested, that the contrary interpretation — the one the Commission is now ready to adopt — would be "consistent with the statute's language, structure, scheme and available legislative history." Moreover, the court of appeals found that the contrary interpretation would lead to "absurd" and "more absurd results" (PG&E Pet. 10a). Furthermore, the Commission has had its chance to render its opinion and to support it before the court of appeals. The Commission has no further right to overrule its position and certainly no right to expect deference to be paid to its contortions. This Court over a century ago recognized that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, . . . speculate of chances from changes in its [a court's] members." *Roberts v. Cooper*, 61 U.S. (20 How.) 467, 481 (1858). Here, and even more repugnantly, it is the current Commission which wishes to elongate an already elongated proceeding to permit an overruling based on "chances from change in its members."

⁵The underlying competitive relicensing proceeding of Santa Clara involves a license which expired in 1975 and a proceeding which has been

would be preferable for this Court, if it is not willing simply to deny certiorari, to grant certiorari and to resolve the matter on its merits. We submit that any action along the lines suggested by the Solicitor General would acquiesce in and acknowledge, even if only in part, the politicalization of the decision of this Commission, and operate as an encouragement to employment by this and other commissions of the same distressing tactic. That suggestion should be rejected. Rejection would also avoid any possible litigation of the serious question of whether, having apparently already determined the outcome of remand when the issue was not before it and long after the Commission lost jurisdiction to decide the matter (16 U.S.C. §8251(b)), the Commissioners are legally able to withstand motions for disqualification.

The law provides that when the record is filed with the court of appeals, the Commission loses jurisdiction (*id.*). In short, the law provides that the Commission has one opportunity (including the chance to correct itself on rehearing) to make a decision and that it loses that opportunity when the record is filed with the court of appeals. The Commission's attempt here to obtain a "second bite" on a purely legal matter after that very same Commission successfully urged affirmance by the court of appeals is, to our knowledge, unprecedented. We find the total absence of case authority in the FERC Brief eloquent.

We believe the Solicitor General's suggestion that the matter be returned to the court of appeals inappropriate. In sum, while it would permit the Solicitor General to wash his hands of the unpleasant task of considering the basis of the Commission's current position and determining the appropriate position of the United States and, under established delegation, leave the Commission free to present whatever argument it desires to make, without tainting the Office of the Solicitor

waiting since that time for the resolution of this issue before the Commission will even set it for hearing. Some eight years of advantage have gone to PG&E by default, since the Commission automatically grants PG&E an annual license each year. More years are likely to go to PG&E by default if the proceeding is remanded to the court of appeals for any reason.

General, it would be a disservice to the interests of justice and the need for resolution of the issue.

Without confessing error, FERC seeks more from this Court than it could obtain with a confession of error. As this Court stated in *Orloff v. Willoughby*, 345 U.S. 83, 87 (1953):

This Court, of course, is not bound to accept the Government's concession that the courts below erred on a question of law. They accepted the Government's argument as then made and, if they were right in doing so, we should affirm.

Here, the Eleventh Circuit was right in accepting the Commission's argument as then made. This Court should deny certiorari or affirm.

CONCLUSION

For the reasons stated above, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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No.
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ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY
and
THE MONTANA POWER COMPANY, ET AL.,
Petitioners,
v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE
MONTANA PUBLIC SERVICE COMMISSION
IN SUPPORT OF PETITIONERS

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IN THE
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UTAH POWER & LIGHT COMPANY

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FEDERAL ENERGY REGULATORY COMMISSION

Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

MOTION OF THE MONTANA PUBLIC SERVICE
COMMISSION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Montana Public Service Commission
respectfully requests leave to file the
accompanying brief amicus curiae in support

of the petition for a writ of certiorari, filed in this case by Utah Power & Light Company ("Utah Power") and The Montana Power Company ("Montana Power"). The Montana Public Service Commission at its meeting on March 7, 1983 in Helena, Montana approved the filing of an amicus brief in support of petitioners. Written consent from Montana Power has been received and the consent of the Solicitor General and Utah Power will be filed directly with the Clerk of the United States Supreme Court.

The Montana Public Service Commission's interest in this case arises from its statutory duty in Montana to supervise, regulate and control public utilities such as Montana Power and its corresponding authority to assure the best use of Montana's natural resources to provide inexpensive hydroelectric power to the citizens and ratepayers of Montana.

On June 27, 1980, the Federal Energy Regulatory Commission ("FERC") issued an "Opinion and Order Declaring Municipal Preference Applicable to Hydro-Electric Relicensings," 11 F.E.R.C. (CCH) ¶61,337 ("Opinion 88"), threatening to eliminate the Montana ratepayers' access to inexpensive hydroelectric power. As a result, a limited number of fortunately situated municipalities will be allowed to "acquire" the hydroelectric facilities at a cost far below fair market value. The inexpensive power produced from these "acquired" facilities will then be available only to the acquiring municipality while all other Montana ratepayers will experience rate increases.

In its amicus brief the Montana Public Service Commission discusses the adverse impacts upon the citizens and ratepayers in Montana resulting from the decision in Alabama Power Co. v. F.E.R.C. 685 F.2d,

1311 (11th Cir. 1982) which affirmed the F.E.R.C. ruling, *supra*. The disastrous effects of splitting the hydroelectric facilities in Montana among separate municipalities both within and outside the State of Montana would create a situation where a relatively few ratepayers would benefit greatly from the possible acquisition of existing hydroelectric facilities at a cost far below their actual or market value and the majority of Montana ratepayers would be effectively deprived of the low-cost power from projects which they paid for through the years. The Montana Public Service Commission is in a position to provide information on the effect of municipal preference on the citizens and ratepayers of Montana and to represent their interests in this extremely important case.

The Montana Public Service Commission believes that the action of the Court below

in affirming Opinion 88 will adversely affect the general welfare of the people of Montana and of the nation for the benefit of a limited number of fortuitous municipalities. The Montana Commission considers the decisions below to be extremely significant in that they would discourage full maximization of the nation's hydroelectric resources, dampen private investor interest in constructing, owning, or operating hydroelectric facilities, and have the net effect of raising consumers' electricity costs. The significance of the question of Federal law presented here is of primary relevance to the court's consideration of the petition for a writ of certiorari, and the full importance of that question can be appreciated only if the Court is completely aware of the impact on the ratepayers resulting from the decisions below.

The Montana Commission due to its unique regulatory and public interest perspective,

believes that it can provide this Court with valuable insight into the consequences of this case, and a more complete understanding of what is at stake in this litigation.

Respectfully submitted,

THE MONTANA PUBLIC SERVICE
COMMISSION

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March 9, 1983

-7-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY

AND

THE MONTANA POWER COMPANY, ET AL.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION

Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE MONTANA
PUBLIC SERVICE COMMISSION IN SUPPORT OF
PETITIONERS

STATEMENT OF THE CASE

This controversy involves the interpretation of the scope of the statutory preference granted to municipalities under Part I of the Federal Power Act in licensing hydroelectric power projects. The petition for certiorari filed by Utah Power & Light Co. ("Utah Power") and The Montana Power Company ("Montana Power") on February 4, 1983, contends that the Federal Power Act distinguishes between "original licensees" and "new licensees" and that the municipal preference does not apply in a relicensing proceeding against the "original licensee" applying for a license renewal. The Federal Energy Regulatory Commission ("FERC") interprets the term "new licensees" as used in §7(a) to include any applicant for a new license, including the "original licensee," and therefore intends to apply the municipal preference against both "new" and "original" licensees.

Federal Energy Regulatory Commission Opinion 88, "Opinion and Order Declaring Municipal Preference Applicable to Hydro-Electric Relicensings" (Opinion 88), issued June 27, 1980, 11 F.E.R.C. (CCH) ¶61,337 ("Opinion 88"). FERC's decision was affirmed by the United States Circuit Court of Appeals for the Eleventh Circuit on September 17, 1982, as reported at 685 F.2d 1311 (11th Cir. 1982). The Montana Public Service Commission ("Montana Commission") files this brief of amicus curiae in support of petitioners Utah Power and The Montana Power Company, with the consent of petitioners and respondent Federal Energy Regulatory Commission.

In Montana, a public utility is defined by statute as follows:

Section 69-3-101 M.C.A. Meaning of term 'Public Utility'. The term 'public utility', within the meaning of this chapter, shall embrace every corporation, both public and private, company, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever, that

now or hereafter may own, operate, or control any plant or equipment, any part of a plant or equipment, or any water right within the state for the production, delivery, or furnishing for or to other persons, firms, associations, or corporations, private or municipal:

- (1) heat;
- (2) street-railway service;
- (3) light;
- (4) power in any form or by any agency;
- (5) except as provided in chapter 7, water for business, manufacturing, household use, or sewerage service, whether within the limits of municipalities, towns and villages or elsewhere;
- (6) telegraph or telephone service.

Pursuant to Section 69-3-102 M.C.A., the Montana Public Service Commission is given the authority to supervise and regulate public utilities:

69-3-102. Supervision and regulation of public utilities. The commission is hereby invested with full power of supervision, regulation, and control of such public utilities, subject to the provisions of this chapter and to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town, or village.

Because Federal Energy Regulatory Commission Opinion 88¹ will have substantial adverse economic impacts on customers of non-municipal utilities within Montana and on the State itself, the Montana Commission urges the Court to grant Utah Power's and Montana Power's petition for a writ of certiorari in this case.

Montana consumers of electric power are served by Montana Power, by cooperatively-owned utilities, and by Pacific Power & Light. Electric power needs in Montana are met through a combination of coal-fired, gas-fired and oil-fired thermal plants, hydroelectric projects and (primarily in the case of cooperatively-owned systems) by purchased power from Federally-owned hydroelectric projects. The least expensive sources of

¹City of Bountiful, Docket No. EL78-43 (June 27, 1980) 11 FERC (CCH) ¶61,337; aff. 685 F.2d 1311 (11th Cir. 1982).

electric energy for consumers in Montana are the hydroelectric projects, and among the least expensive sources of hydroelectric power are Montana Power's older projects which are presently subject to relicensing proceedings or which are scheduled to be relicensed by the FERC within the next twenty years. The 13 hydroelectric projects of Montana Power and their license expiration dates are:

<u>Name</u>	(kW) <u>Capacity</u>	<u>Project</u>	<u>License Expires</u>
Black Eagle	16,800	(2188)	12/01/1998
Cochrane	48,000	(2188)	12/01/1998
Hauser	17,000	(2188)	12/01/1998
Holter	38,400	(2188)	12/01/1998
Kerr	197,000	(#5)	05/23/1980
Morony	45,000	(2188)	12/01/1998
Mystic	10,000	(2301)	12/31/2009
Rainbow	35,600	(2188)	12/01/1998
Ryan	48,000	(2188)	12/01/1998
Thompson Falls	30,000	(1869)	12/31/2015
Flint Creek	1,100	(1473)	07/01/1988

<u>Name</u>	<u>Capacity</u>	<u>Project</u>	<u>License Expires</u>
Madison	9,000	(2188)	12/01/1998
Milltown	<u>3,040</u>	(2543)	12/31/1993
	499,940		

The Commission regulates Montana Power's retail sales in Montana of the electricity generated by these 499,940 kilowatts of inexpensive hydroelectric power capacity with a policy goal of assuring maximum benefit for all Montana ratepayers. Montana Power consumers' rates reflect the low cost power produced by these facilities. These projects were largely paid for by Montana ratepayers through inclusion in their rates of depreciation charges and return on Montana Power's original investment in these projects. The ratepayers of Montana Power have a substantial interest in seeing Montana Power maintain the inexpensive components of its power producing system. The Montana Commission takes the position that

Montana Power's ratepayers should continue to receive the benefits of these 13 projects which they have largely paid for over the last 60 years. The Commission's mandate to protect the public interest of all the customers of the electric utilities it regulates compels it to express its support for the petition for writ of certiorari.

SUMMARY OF ARGUMENT

The Montana Commission urges the Court to review the decision below because of the legal and practical consequences of that decision. The Montana Commission believes that the practical effects of the decision upon electric energy consumers, particularly in Montana, should be noted by the Court. This amicus curiae brief addresses the economic impacts and the unfairness of allowing a few unregulated municipalities to take over the hydroelectric facilities of a State-regulated utility to the detriment of a broader-based group of electric consumers.

ARGUMENT: REASONS FOR GRANTING THE WRIT

A. This Case Presents an Important
Question of Federal Law Which Should be
Settled by the Supreme Court

The Montana Commission believes that the petitioners' appeal is worthy of review by the Supreme Court because of the practical importance of the federal law questions incorporated in the appeal. In particular, the Montana Commission emphasizes that the appellate court's affirmation of FERC Opinion 88 has important practical consequences for consumers of electricity in almost every state. The impacts of Montana consumers are representative of the widespread effects of this decision. Investor-owned utilities licensed under Part I of the Federal Power Act serve approximately 43 million consumers.

1. Montana Power's Loss of the 13
Projects Will Reduce the Relia-
bility of Montana Power's System

Montana Power operates an integrated system of power production, transmission and distribution. The integrated nature of a utility's operations provides important service benefits including system reliability and efficiency maximization. Montana Power's hydroelectric projects serve a unique and critical function within this integrated system by enhancing the reliability of Montana Power's overall system.

Utilities achieve reliability through use of individual components and subsystems which have been developed and tested to achieve low failure rates, and by providing multiple sources and paths for power supply so that no single equipment failure will cause service interruptions. Montana Power's

hydroelectric projects serve these reliability functions in two respects: First, those projects which have storage capacity can provide peaking power to meet any anticipated demands on Montana Power's systems. Second, Montana Power's hydroelectric facilities can provide an important "start up" capability for the entire Montana Power system following a system-wide service interruption. Should Montana Power lose its hydroelectric facilities through relicensing proceedings, Montana Power will be required to provide greater reliability by augmenting its system with diesel or gas turbine units at great expense to the Montana ratepayers and with a significant increase in consumption of oil or natural gas.

The electric utility business is a business sensitive to economies of scale. Fragmentation of an integrated system leads

to inefficiencies, duplication and waste when viewed on a regional scale.² Montana Power has experience and expertise in maintaining and operating its facilities, and a pool of personnel specifically trained to operate each particular hydroelectric project. Fragmentation will displace much of this expertise, adding to the inefficiency, waste and reliability losses of the entire regional system. It is the Commission's goal to eliminate inefficiency and waste in the interests of the Montana ratepayer.

²See Power Pooling in the United States, FERC-0049, Office of Electric Power Regulation, Federal Energy Regulatory Commission Report, December, 1981, p.2-5, 19. Although interconnection agreements among smaller utilities may help reduce in inefficiency of a fragmented system, these agreements have failed to recreate the service coordination and administrative efficiencies of a unified system. See Id. p. 39-50.

2. Opinion 88 Threatens to Deprive Montana Power's Ratepayers of Low Cost Power from Projects Largely Paid for by Those Ratepayers.

In the event that Montana Power's projects are transferred to "new licensees," compensation to Montana Power from the "new licensee" is limited to "net" investment plus severance damages. See §§ 14 and 15 of the Federal Power Act, as amended, 16 U.S.C. §§796(13) and 807(a)(1976). The "net" investment factor is based upon original cost less amortization over the years of operation. The remaining "net" investment at the time of relicensing, therefore, ignores the value of the facility for purposes of replacement or the increased cost of fuel to operate a replacement facility. Thus, the FERC anticipates that the compensation the "original licensee" would receive

could range from zero to a substantial part of the cost of construction or acquisition many years ago when price levels were much lower than today, and would be considerably less than the cost of building or otherwise acquiring new generating capacity today.

FERC Opinion 88 at p. 4. The Montana Commission believes that Montana consumers would thus face these adverse impacts: (1) compensation for the loss of property at less than its fair value, (2) increased system-wide electric rates due to loss of inexpensive power, (3) the expense of constructing replacement capacity at inflated capital cost and (4) fuel costs.

B. The Court of Appeals Failed To Thoroughly Examine the FERC's Conclusion

Nothing in the language of the Act provides that original licensees are to be subject to a municipal preference in re-licensing proceedings. Instead, Section 7(a) of the statute limits application of the municipal preference by use of the phrase

"to new licensees;" and "new licensees" are all applicants other than an original licensee. There is no compelling legislative history or policy reason to read the statute as if it established a preference against original licensees. The opportunity for the governmental takeover of licensed projects is fully preserved without such preference by (1) opportunity for condemnation, expressly reserved by Section 14(a) of the Federal Power Act, 16 U.S.C. §807 (1976), (2) Federal takeover pursuant to Section 14, (3) a preference against "new licensees" in relicensing and (4) the opportunity to compete on an equal footing with original licensees in relicensing, under Section 7(a)'s "best adapted" standard. 16 U.S.C. §800(a) (1976).

The Court of Appeals failed to examine carefully the FERC's analysis in Opinion 88, it affirmed the result without seriously analyzing the reasoning and the materials

relied upon by the FERC. The FERC's position is inconsistent with the language and legislative history of the Act, as well as with the statutory policy of serving, first and foremost, the public interest in the use of limited and valuable hydroelectric power resources.

CONCLUSION

The Court should review this case because of the substantial interest of electric consumers in Montana and throughout the nation in the future allocation of benefits of low-cost hydroelectric power. The decision below provides important competitive advantages to municipal applicants competing with Montana Power and other investor-owned utilities for new licenses upon expiration of its original licenses. In Montana Power's case, those competitive advantages may ultimately result in the transfer of Montana Power's projects to municipal "new

licensees." In view of the substantial disruption to Montana Power's system and the manifest injustice which such a transfer would produce, this Court should grant certiorari in order to determine authoritatively whether Congress intended to establish a municipal preference against "original licensees."

Respectfully submitted,

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March 9, 1983

CERTIFICATE OF MAILING

The undersigned certifies that a copy of the foregoing Motion for Leave to File Brief and Brief of Amicus Curiae of the Montana Public Service Commission has been served by mail, postage prepaid, upon all parties listed below as of this 9th day of March, 1983.

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ON FILED
MAR 3 1983

No. 82-1312

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY

AND

THE MONTANA POWER COMPANY, *et al.*,

Petitioners,

versus

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit

**MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF OF AMICUS CURIAE
UTAH PUBLIC SERVICE COMMISSION**

BRENT S. CAMERON, *Chairman*

DAVID R. IRVINE, *Commissioner*

JAMES M. BRYNE, *Commissioner*

IN SUPPORT OF PETITIONERS

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March 3, 1983

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1312

UTAH POWER & LIGHT COMPANY
AND
THE MONTANA POWER COMPANY, *et al.*,
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for the Eleventh Circuit

MOTION OF THE
UTAH PUBLIC SERVICE COMMISSION
FOR LEAVE TO FILE BRIEF AMICUS CURIAE
IN SUPPORT OF PETITIONERS

The Utah Public Service Commission respectfully requests leave to file the accompanying brief *amicus curiae* in support of the petition for a writ of certiorari, filed in this case by Utah Power & Light Company ("Utah Power") and the Montana Power Company. The Public Service Commission has requested from each of the nine parties to the case consent to file this *amicus curiae* brief. As of the time this motion was printed, written consent had been received from the following parties: Solicitor General, Department

of Justice; Federal Energy Regulatory Commission; Utah Power & Light Company and The Montana Power Company; Pacific Power & Light Company; Pacific Gas & Electric Company and Wisconsin Power and Light Company; and Alabama Power Company and the Hydroelectric Utility group. No party had provided written notice of a refusal to consent. Neither a consent nor a denial had been received from the following parties: American Public Power Association; City of Bountiful, Utah; Clark-Cowlitz Joint Operating Agency; and City of Santa Clara, California. Copies of the relevant correspondence have been filed with the Clerk of this Court.

The Utah Public Service Commission's interest in this case stems from its role as a public regulator of utility use of Utah's natural resources and also as the agency charged with assessing the economic impact of utility charges on Utah consumers and on the well-being of the State of Utah. The availability of inexpensive hydroelectric power to the broadest group of Utah electric power consumers is an issue of particular importance to the Utah Commission in its efforts to regulate and maintain the supply of electric power at the lowest possible cost.

On June 27, 1980, the Federal Energy Regulatory Commission ("FERC") issued an "Opinion and Order Declaring Municipal Preference Applicable to Hydro-Electric Relicensings," 11 F.E.R.C. (CCH) ¶61,337 ("Opinion 88"), threatening to eliminate the Utah ratepayers' access to inexpensive hydroelectric power. As a result, a limited number of fortunately situated municipalities will be allowed to "acquire" the hydroelectric facilities at a cost far below fair market value. The inexpensive power produced from these "acquired" facilities will then be available only to the acquiring municipality while all other Utah ratepayers will experience rate increases.

The following *amicus curiae* brief discusses specifically the adverse impacts upon the public in Utah resulting from the FERC's ruling, as affirmed by the United States Court of Appeals for the Eleventh Circuit, in *Alabama Power Co. v. F.E.R.C.*, 685 F.2d 1311 (11th Cir. 1982). The fragmentation of the Utah hydroelectric facilities among separate municipalities would reduce the overall reliability of utility service in Utah. The threatened "acquisition" of the hydroelectric facilities at a cost far below fair market value would deprive the mass of Utah ratepayers of low-cost power from projects largely paid for by those ratepayers. The significance of these impacts is not specifically addressed in Utah Power's petition for a writ of certiorari, and the Utah Public Service Commission is uniquely well situated to provide such information. No other party is able to adequately represent the interest of the people of the State of Utah in this case.

The Utah Public Service Commission believes that the action of the Court below in affirming Opinion 88 will adversely affect the general welfare of the people of Utah and of the nation for the benefit of a limited number of fortuitous municipalities. The Utah Commission considers the decisions below to be extremely significant in that they would discourage full maximization of the nation's hydroelectric resources, dampen private investor interest in constructing, owning, or operating hydroelectric facilities, and have the net effect of raising consumers' electricity costs. The significance of the question of Federal law presented here is of primary relevance to the court's consideration of the petition for a writ of certiorari, and the full importance of that question can be appreciated only if the Court is completely aware of the impact on the ratepayers resulting from the decisions below.

The Utah Commission, due to its unique regulatory and public interest perspective, believes that it can provide this Court with valuable insight into the consequences of this case, and a more complete understanding of what is at stake in this litigation.

Respectfully submitted,

THE UTAH PUBLIC SERVICE COMMISSION

by BRENT H. CAMERON

Chairman and Counsel of Record

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March 3, 1983

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**BRIEF OF AMICUS CURIAE
UTAH PUBLIC SERVICE COMMISSION
IN SUPPORT OF PETITIONERS**

STATEMENT OF THE CASE

This controversy involves the interpretation of the scope of the statutory preference granted to municipalities under Part I of the Federal Power Act in licensing hydroelectric power projects. The petition for certiorari filed by Utah Power & Light Company ("Utah Power") and The Montana Power Company on February 4, 1983, contends that the Federal Power Act distinguishes between "original licensees" and "new licensees" and that the municipal pref-

erence does not apply in a relicensing proceeding against the "original licensee" applying for a license renewal. The Federal Energy Regulatory Commission ("FERC") interprets the term "new licensees" as used in § 7 (a) of the Federal Power Act to include any applicant for a new license, including the "original licensee," and therefore intends to apply the municipal preference against both "new" and "original" licensees. Federal Energy Regulatory Commission Opinion 88, "Opinion and Order Declaring Municipal Preference Applicable to Hydro-Electric Relicensings," issued June 27, 1980, 11 F.E.R.C. (CCH) ¶61,337 ("Opinion 88"). Opinion 88 was affirmed by the United States Circuit Court of Appeals for the Eleventh Circuit on September 17, 1982, as reported at 685 F.2d 1311 (11th Cir. 1982). The Utah Public Service Commission ("Utah Commission") files this brief as *amicus curiae* in support of petitioners Utah Power and The Montana Power Company, with the consent of the petitioners.

INTEREST OF THE PUBLIC SERVICE COMMISSION OF UTAH

The Utah Commission is the administrative body in the State of Utah with the duty to supervise the use of natural resources by utilities to avoid waste and to assure adequate and continuous service to the public. *McMullin v. Public Service Comm.*, 7 Utah 2d 157, 320 P.2d 1107 (1958). An important aspect of the Utah Commission's duty is the regulation of utility use of the State's limited water resources. The Utah Commission is authorized under Section 54-3-1 of the Utah Code to examine the "economic impact of [utility] charges on each category of customer, and on the well-being of the State of Utah." *See, Utah Cable Television Operators Assn. v. Public Service Commission*, Utah, 656 P.2d 398 (1982). Because Opinion 88 will have substantial adverse economic impacts on customers of non-municipal

utilities within Utah and on the State itself, the Utah Commission urges the Court to grant Utah Power's petition for a writ of certiorari in this case.

Utah consumers of electric power are served by Utah Power, by cooperatively-owned utilities, and by municipal utilities. Electric power needs in Utah are met through a combination of coal-fired, gas-fired and oil-fired thermal plants, geothermal projects, hydroelectric projects and (primarily in the case of municipal and cooperatively owned systems) by purchased power from federally-owned hydroelectric projects. The least expensive sources of electric energy for consumers in Utah are the hydroelectric projects, and among the least expensive sources of hydroelectric power are Utah Power's older projects which are presently subject to relicensing proceedings or which are scheduled to be relicensed by the FERC within the next twenty years. The 13 hydroelectric projects of Utah Power with licenses that expire within the next 20 years are:

<u>Name</u>	<u>Capacity (kw)</u>	<u>License Expires</u>
Weber	2,500	Already Expired
Olmsted	12,700	Already Expired
Beaver	2,400	Already Expired
Ashton	5,800	December 31, 1987
St. Anthony	500	December 31, 1987
Cutler	30,000	December 31, 1993
Stairs	1,000	June 30, 2000
Oneida	30,000	June 30, 2000
Pioneer	5,000	August 31, 2000
American Fork	950	October 31, 2000
Cove	7,500	October 1, 2001
Grace	33,000	October 1, 2001
Soda	14,000	July 4, 2003
<hr/> Total Capacity	<hr/> 145,350	

The Utah Commission regulates Utah Power's retail sales of electricity in Utah generated by these 145,350 kilowatts of inexpensive hydroelectric power capacity with a policy goal of assuring maximum benefit for all Utah ratepayers. Utah Power consumers' rates reflect the low cost power produced by these facilities. These projects were largely paid for by Utah ratepayers through inclusion in their rates of depreciation charges and return on Utah Power's original investment in these projects. The ratepayers of Utah Power have a substantial interest in seeing Utah Power maintain the inexpensive components of its power producing system. The Utah Commission takes the position that Utah Power's ratepayers should continue to receive the benefits of these 13 projects which they have largely paid for over the last 60 years. The Utah Commission's mandate to protect the public interest of all the customers of the electric utilities it regulates compels it to express its support for the petition for writ of certiorari.

SUMMARY OF ARGUMENT

The Utah Commission urges the Court to review the decision below because of the legal and practical consequences of that decision. The Utah Commission believes that the practical effects of the decision upon electric energy consumers, particularly in Utah, should be noted by the Court. This *amicus curiae* brief addresses the economic impacts and the unfairness of allowing a few unregulated municipalities to take over the hydroelectric facilities of a State regulated utility to the detriment of a broader based group of electric consumers.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I. This Case Presents an Important Question of Federal Law Which Should be Settled by the Supreme Court

The Utah Commission believes that the Supreme Court should grant petitioners' writ because of the practical im-

portance of the federal law questions raised in the writ. In particular, the Utah Commission emphasizes that the appellate court's affirmance of Opinion 88 has important practical consequences for consumers of electricity in almost every state. The impacts on Utah consumers are representative of the widespread effects of the Opinion. Investor-owned utilities licensed under Part I of the Federal Power Act serve approximately 43 million consumers.

A. Utah Power's Loss of the 13 Projects Will Reduce the Reliability of Utah Power's System

Utah Power operates an integrated system of power production, transmission and distribution. The integrated nature of a utility's operations provides important service benefits including system reliability and efficiency maximization. Utah Power's hydroelectric projects serve a unique and critical function within this integrated system by enhancing the reliability of Utah Power's overall system.

Utilities achieve reliability through use of individual components and subsystems which have been developed and tested to achieve low failure rates, and by providing multiple sources and paths for power supply so that no single equipment failure will cause service interruptions. Utah Power's hydroelectric projects serve these reliability functions in two respects: First, those projects which have storage capacity can provide peaking power to meet any unanticipated demands on Utah Power's systems. Second, Utah Power's hydroelectric facilities can provide an important "start up" capability for the entire Utah Power system following a system-wide service interruption.¹ Should Utah

¹ Utah Power has submitted contingency plans which provide for using its hydroelectric power to restore current following a black-out. As the Utah Division of Public Utilities has recognized, this option will be unavailable to Utah Power if the projects are

Power lose its hydroelectric facilities through relicensing proceedings, Utah Power will be required to provide greater reliability by augmenting its system "start up" with diesel or gas turbine units at great expense to the Utah ratepayers and with a significant increase in consumption of oil or natural gas.

The electric utility business is a business sensitive to economies of scale. Fragmentation of an integrated system leads to inefficiencies, duplication and waste when viewed on a regional scale.² Utah Power has experience and expertise in maintaining and operating its facilities, and a pool of personnel specifically trained to operate each particular hydroelectric project. Fragmentation will displace much of this expertise, adding to the inefficiency, waste and reliability losses of the entire regional system. It is the Utah Commission's goal to eliminate inefficiency and waste in the interests of the Utah ratepayer.

B. Opinion 88 Threatens to Deprive Utah Power's Ratepayers of Low Cost Power From Projects Largely Paid For by Those Ratepayers

In the event that Utah Power's projects are transferred to "new licensees," compensation to Utah Power from the "new licensee" is limited to "net investment" plus severance damages. See, §§ 14 and 15 of the Federal Power Act, as amended, 16 U.S.C. §§ 807-08 (1976). The "net in-

relicensed to other utilities. *Special Engineering Report: An Engineering Analysis of the UP&I CO Power Outage of January 8, 1981*, Utah Division of Public Utilities, P. 5, February 6, 1981.

² See *Power Pooling In The United States*, FERC-0049, Office of Electric Power Regulation, Federal Energy Regulatory Commission Report, December, 1981, p. 2-5, 19. Although interconnection agreements among smaller utilities may help reduce the inefficiency of a fragmented system, these agreements have failed to recreate the service coordination and administrative efficiencies of a unified system. See *Id.* p. 39-50.

vestment" factor is based upon original cost less amortization over the years of operation. The remaining "net investment" at the time of relicensing, therefore, ignores the value of the facility for purposes of replacement capacity or the increased cost of fuel to operate a replacement facility. Thus, the FERC anticipates that the compensation the "original licensee" would receive

could range from zero to a substantial part of the cost of construction or acquisition many years ago when price levels were much lower than today, and would be considerably less than the cost of building or otherwise acquiring new generating capacity today.

Opinion 88 at p. 4. The Utah Commission believes that Utah consumers would thus face these adverse economic impacts: (1) compensation for the loss of property at less than its fair value, (2) increased system-wide electric rates due to loss of inexpensive power, (3) the expense of constructing replacement capacity at inflated capital cost and (4) increased fuel costs.³

³ These four conclusions are verified by recently filed documents of Utah Power and FERC publications. "The Annual Report of Electric Utilities and Licensees and Others," FERC Form No. 1, indicates that the original capacity cost of Utah Power's hydroelectric power plants ranges from \$132.00 to \$505.60 per kilowatt of installed capacity. The median cost of hydroelectric plant capacity is approximately \$240 per kilowatt. The replacement cost of that capacity in Utah is approximately \$995 per kilowatt (See, Energy Information Administration, U.S. Dept. of Energy, DOE/EIA-0356/1, Vol. 1, Projected Costs of Electricity from Nuclear and Coal Fired Power Plants, Table 7, p. 30 (1982) — four times the cost of the capacity already in place. Additionally, the new capacity will incur heavy fuel costs for coal, gas or oil. To the extent that the Utah ratepayers lose access to inexpensive hydroelectric power and are required to construct additional fossil fuel plant capacity, the Utah ratepayers will experience an increasing financial burden solely for the benefit of select municipalities favored under the FERC's interpretation of the Federal Power Act.

Several Utah Power hydroelectric generating facilities are located outside of the State of Utah. (The Ashton, Cove, Grace, Oneida, Soda and St. Anthony Plants are located in Idaho.) These out-of-state facilities were substantially paid for by the Utah electricity customers (who constitute 89 percent of Utah Power's customers) through their monthly utility bills. At present, these low-cost hydroelectric facilities help lower the average cost of power to all customers of Utah Power. If these out-of-state facilities are transferred to municipalities in Idaho pursuant to relicensing proceedings, the benefits of this inexpensive hydroelectric power will be permanently removed from the State of Utah, despite the significant contribution made by Utah consumers to pay for the projects.⁴

⁴ The disproportionate burden presently shouldered by Utah consumers has been previously noted by the Utah Commission in its ratemaking decisions. The Utah Commission has publicly criticized the continued refusal of the Wyoming and Idaho Public Service Commissions to provide Utah Power an adequate return on investment for Utah Power's activities outside of Utah:

[W]e realize that we may be to some extent carrying the regulatory burden of other jurisdictions, but to do otherwise would likely result in higher capital costs for all customers of Utah. It seems as if other jurisdictions would require Utah Power to be in virtually desperate financial condition before they would grant a more appropriate rate relief. *Utah Power & Light Co.*, Case No. 79-035-103 (January 28, 1980).

The FERC's decision affirmed by the Eleventh Circuit Court of Appeals would add to the already disproportionate burden on the Utah electric ratepayers.

II. The Court of Appeals Failed to Thoroughly Examine the FERC's Conclusion

Nothing in the language of the Federal Power Act provides that original licensees are to be subject to a municipal preference in relicensing proceedings. Instead, Section 7 (a) of the statute limits application of the municipal preference by use of the phrase "to new licensees;" and "new licensees" are all applicants *other than* an original licensee. There is no compelling legislative history or policy reason to read the statute as if it established a preference against original licensees. The opportunity for the governmental takeover of licensed projects is fully preserved without such preference by (1) opportunity for condemnation, expressly reserved by Section 14 (a) of the Act, 16 U.S.C. § 807 (1976) , (2) Federal takeover pursuant to Section 14, (3) a preference against "new licensees" in relicensing and (4) the opportunity to compete on an equal footing with original licensees in relicensing, under Section 7(a)'s "best adapted" standard. 16 U.S.C. § 800 (a) (1976) .

The Court of Appeals failed to examine carefully the FERC's analysis in Opinion 88; it affirmed the result without seriously analyzing the reasoning and the materials relied upon by the FERC. The FERC's position is inconsistent with the language and legislative history of the Federal Power Act, as well as with the statutory policy of serving, first and foremost, the public interest in the use of limited and valuable hydroelectric power resources.

CONCLUSION

The Court should review this case because of the substantial interest of electric consumers in Utah and throughout the nation in the future allocation of benefits of low-cost hydroelectric power. The decision below provides important advantages to municipal applicants competing with Utah Power and other investor-owned utilities for new

licenses upon expiration of original licenses. In Utah Power's case, those competitive advantages may ultimately result in the transfer of Utah Power's projects to municipal "new licensees." In view of the substantial disruption to Utah Power's system and the manifest injustice which such a transfer would produce, this Court should grant certiorari in order to determine whether Congress intended to establish a municipal preference against "original licensees."

Respectfully submitted,

THE UTAH PUBLIC SERVICE COMMISSION

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Nos. 82-1312, 82-1345 and 82-1346

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

UTAH POWER & LIGHT COMPANY and
THE MONTANA POWER COMPANY,
v. *Petitioners*

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

ALABAMA POWER COMPANY, *et al.*,
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Respondent

PACIFIC GAS AND ELECTRIC COMPANY, *et al.*,
v. *Petitioners*

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

On Petitions for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE
AND BRIEF OF THE
SACRAMENTO MUNICIPAL UTILITY DISTRICT,
THE NORTHERN CALIFORNIA POWER AGENCY,
AND THE CITIES OF ANAHEIM, AZUSA, BANNING,
COLTON AND RIVERSIDE, CALIFORNIA
AS AMICI CURIAE IN OPPOSITION TO THE PETITION
FOR A WRIT OF CERTIORARI**

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May 18, 1983

IN THE
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**MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE
ON BEHALF OF THE
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IN OPPOSITION TO THE PETITIONS
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The Sacramento Municipal Utility District, the Northern California Power Agency, and the Cities of Anaheim, Azusa, Banning, Colton and Riverside, California hereby move for leave to file the attached brief *amici curiae* in opposition to the petitions for a writ of certiorari. The brief supports the position of the municipal electric utilities, and their association, which are private respondents in this proceeding.¹

1. The *amici curiae* consist of the following entities, which are all municipalities within the meaning of Section 3(7) of the Federal Power Act, 16 U.S.C. § 796(7): (a) the Sacramento Municipal Utility District, Sacramento, California; (b) the Northern California Power Agency, a joint powers agency created pursuant to an agreement among various municipal utilities and one cooperative utility, which is an associate member, operating electrical distribution systems in northern and central California; and (c) the cities of Anaheim, Azusa, Banning, Colton and Riverside, California, all located in southern California. In this motion and the attached brief, the *amici curiae* are referred to collectively as "SMUD-Cal Cities."

2. The present proceeding concerns the interpretation of the hydroelectric licensing provisions of the Federal Power Act and, specifically, the issue whether the "municipal preference" contained in Section 7(a) of the Act applies as against the original licensee in a competitive relicensing proceeding. SMUD-Cal Cities are presently joint license applicants in two pending competitive relicensing proceedings at the Federal Energy Regulatory Commission which could turn on the application, *vel non*,

¹ The Solicitor General has consented to the filing of this brief, as have the private respondents and the petitioners in Docket No. 82-1346. The other petitioners have withheld their consent.

of the municipal preference.² SMUD-Cal Cities, accordingly, have a clear and immediate interest in the outcome of this case.

3. As entities presently involved in competitive relicensing proceedings at the Commission, SMUD-Cal Cities are concerned that there be an expeditious, final and correct resolution of the municipal preference issue—either by a denial of the petitions for a writ of certiorari or, in the alternative, by a decision of this Court on the merits. License applications are costly and time-consuming to prosecute. SMUD-Cal Cities have prosecuted their two license applications in the belief that the Commission's 1980 decision in this case was correct and that, even if it were not, the matter would be settled finally within a reasonable time through judicial review.

Therefore, SMUD-Cal Cities are especially distressed by the recent extraordinary events at the Commission which are described in the Solicitor General's brief and which have prompted the request that the decision of the Court of Appeals be vacated and that the case be remanded to that court for some sort of "further proceedings." SMUD-Cal Cities vigorously oppose this request and will urge that after years of delay and uncertainty—and after thorough consideration of the issue by both the Commission and a federal court of appeals—vitally interested parties, like SMUD-Cal Cities, are now entitled to a prompt and definitive resolution of the municipal preference issue.

4. SMUD-Cal Cities submit that their participation will provide an additional perspective on the petitions for

² One proceeding involves the Rock Creek-Cresta Project on the North Fork of the Feather River for which the original license, held by the Pacific Gas and Electric Company, expired on September 30, 1982. (FERC Project Nos. 3177 and 3223.) The other proceeding involves the Haas-Kings River Project on the North Fork of the Kings River for which the original license, also held by the Pacific Gas and Electric Company, will expire on March 31, 1985. (FERC Project No. 6729.)

a writ of certiorari which may be helpful to the Court and request, accordingly, that their motion for leave to file a brief *amici curiae* be granted.

Respectfully submitted,

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May 18, 1983

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INTEREST OF THE AMICI CURIAE

As explained in the accompanying motion, the *amici curiae*, SMUD-Cal Cities, are municipal entities which have filed joint applications at the Federal Energy Regulatory Commission for two expiring hydroelectric project licenses presently held by a private investor-owned utility, the Pacific Gas and Electric Company. The outcome of these competitive relicensing proceedings could turn on the application, *vel non*, of the municipal preference of Section 7 of the Federal Power Act which is at issue in this case. SMUD-Cal Cities, accordingly, have a clear and immediate interest in the case.

SUMMARY OF ARGUMENT

The petitioners in this case seek review of a 1982 decision of the United States Court of Appeals for the Eleventh Circuit which affirmed a 1980 decision of the Commission. In that case, the Commission held that the municipal preference of Section 7(a) of the Federal Power Act "is applicable to all relicensing proceedings in which States or municipalities, and citizens or corporations, request successor licenses for the same water resources." (Pet. App. at 23.)¹

It is SMUD-Cal Cities' position that the decisions below were correct, and that the petitions for a writ of certiorari may properly be denied on the ground that there is no substantial legal issue for this Court to resolve. In the event that a writ of certiorari is nonetheless granted, however, SMUD-Cal Cities urge this Court—in the interests of expedition and finality for the parties, and judicial economy for the courts—to decide the case on the merits.

The Solicitor General has recommended that the decision of the Court of Appeals be vacated and the case remanded to that court for "further proceedings." (S.G. Br.

¹ "Pet. App." refers to the appendix to the petition for a writ of certiorari in Docket No. 82-1345.

at 10.)² Yet he has not suggested the existence of error, or even of new evidence; nor has he offered any other acceptable rationale for that course of action. His recommendation, to the contrary, is based solely on the fact that the composition of the Commission has changed since the time of the agency's decision and that the new Commissioners apparently have advised him of their readiness to overrule the prior decision. (S.G. Br. at 8-10.) This extraordinary justification is not only unprecedented and without foundation in law but, in any event, could not override the strong interests of finality, expedition and economy which require a decision on the merits if a writ of certiorari is granted.

These views are explained in more detail below.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE RESULT BELOW WAS CLEARLY CORRECT

The statute at issue in this case is Section 7(a) of the Federal Power Act. It provides:

"In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region" 16 U.S.C. § 800(a).

The issue that has been raised by petitioners, which are private investor-owned utilities, is whether this "municipal preference" applies in the context of a competitive re-licensing proceeding when the original licensee is a party and seeks to obtain a new license for the same project.

² "S.G. Br." refers to the Solicitor General's Brief.

They claim that it does not. They claim, moreover, that the original licensee has an unwritten, but allegedly "natural," preference in a relicensing proceeding over any competing applicant, even if that applicant is an otherwise preferred state or municipality. As indicated, however, the Commission—on the basis of a thorough and meticulous analysis of the issue (Pet. App. at 14-78)—has held that the municipal preference does apply in such a competitive relicensing situation. And the Court of Appeals below unanimously affirmed that decision.

SMUD-Cal Cities believe that the result below is so clearly correct as to present no substantial legal issue.³ They further believe that it is important that the Court recognize that the result below was in no sense aberrational. It was fully supported by the language and structure of the Federal Power Act, as well as by its legislative history, and also was consistent with the overall policy favoring public ownership of public resources which Congress adopted in the law.

The language and structure of the Act. The result below is wholly consistent with, and indeed was required by, the clear language and structure of the licensing provisions of the Federal Power Act. Section 7(a) expressly provides that in each of the three instances that it covers—(1) "issuing preliminary permits," (2) issuing "licenses where no outstanding preliminary permit has been issued," and (3) "issuing licenses to new licensees under section 15"—the Commission is obliged to give preference to applications by states and municipalities if their plans are, or are made, equally well adapted to conserve and

³ There is no conflict of the circuits here, nor is there any conflict with any decision of this—or for that matter, any other—Court. Indeed, the only other judicial ruling on the issue, which was made contemporaneously with the enactment of the Federal Power Act, held that the "state or municipality under Section 7 is given the preferential right over the original licensee to a renewal of the license." *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, 617 (M.D. Ala. 1922).

utilize in the public interest the water resources of the region. In the third instance, Section 15 of the Act—entitled “New Licenses and Renewals-Compensation of Old Licensee”—expressly covers relicensing.⁴ There is nothing whatever in Section 7(a) to suggest that a special exception to the preference exists for original licensees in competitive relicensing cases.

The private utilities, throughout the course of this proceeding, have advanced various grammatical arguments in an effort to avoid the obvious meaning of the statute. The central argument of this kind involves the claim that an “original licensee”—even when it receives a “new license” under Section 15—somehow cannot be a “new licensee” within the meaning of Section 7(a). But the recipient of this “new license”—whether the existing licensee or a competing applicant—is clearly the “new licensee” as contemplated in Section 7(a). Use of different terms in Section 15—such as “original licensee” and “new licensee”—was necessary simply to distinguish the

⁴ Section 15 provides, in pertinent part:

“That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof: Provided, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.” 16 U.S.C. § 808(a).

competing applicants for the purposes of that section since, for example, the consequences differ depending on whether the existing licensee or the competing applicant receives the new license.⁵

Moreover, even under the petitioners' interpretation of the words "new licensee" in Sections 7(a) and 15 of the Act, the municipal preference must still be applicable in competitive relicensing proceedings involving the original licensee. In every such situation, the Commission must decide whether to issue the new license to the original licensee or the competing applicant, which in all cases would be a "new licensee." Thus, the municipal preference by its terms is applicable in competitive relicensing proceedings against the original licensee, even if the words "new licensee" are construed to exclude original licensees competing for new licenses.

As the Court of Appeals found, moreover, petitioners' theories of alleged "limited preference" are not only inconsistent with the statute's structure, but they also lead to absurd results:

"To follow the petitioners' theory of a 'limited preference' in favor of municipalities and states against new applicants only when incumbent licensees are not competing changes the statute's entire preference structure. Instead of the two preferences outlined above applying to all cases, the preferences would operate only in some cases. We are not convinced that Congress intended such a result, which would cause administration of the Act by the Commission to be confusing and sporadic. Likewise, the adoption of a 'limited preference' advantages incumbent licensees and thus leads to an absurd result. Under this theory, the only time a license holder would fail to obtain reissuance of a license would be when the water project was not profitable. Thus, states and

⁵ A new license issued to the competing applicant, *inter alia*, "may cover any project or projects covered by the original license" and is conditioned upon the compensation of the original licensee.

municipalities realistically would have no preference at all because a preference to a losing project is worthless. Petitioners' position would lead to even more absurd results where the state or municipality was the license holder. By reapplying for the license, the state or municipality would lose its preference." (Pet. App. at 10.)

The private utilities' claims in this regard have been correctly, and persuasively, rejected at every stage of the proceeding. (Pet. App. at 7-10, 55-61.)

The legislative history of the Act. The result below is also consistent with, and fully supported by, the legislative history of the relevant provisions of the Federal Power Act. As the Commission made amply clear in its opinion below, there simply was no doubt at the time of the enactment of the municipal preference that it would apply in competitive relicensing proceedings involving the original licensee. (Pet. App. at 31-44, 61-68.) Although there were many very clear statements to the same effect, the clearest may be that of O.C. Merrill, conceded to be the principal draftsman of the law, and of Congressman Lee, a member of the conference committee, who both agreed that:

"In the development of water powers by agencies other than the United States, the bill gives preference to State and municipalities over any other applicant, both in the case of new developments and in case of acquiring properties of another licensee at the end of a license period." (Pet. App. at 44.)

Merrill further advised the President immediately prior to the time the President signed the bill into law, that:

"For development by agencies other than the United States preference is given to States and municipalities. A similar preference is given for the acquisition of the properties of other licensees at the end of a license period. (Pet. App. at 44.)

This, of course, is exactly what is at issue here: the application of preference "at the end of a license period."

The public use policy of the Act. Finally, the result below is also fully consistent with the water resources policy that Congress adopted in the Federal Power Act.⁶ As the Commission's opinion below explained:

"Congress [in 1920] envisioned probable private development of water power resources with ultimate public ownership possible. The FWPA was enacted at a time when private interests were prepared to proceed to a much greater extent than the federal, State and local governments were, with financing and building hydropower projects. Congress concluded at the time the FWPA was passed that the public interest would best be served by rapid development of water power resources—by private or public entities—leaving the possibility of transfer of the hydro-facilities from private to public ownership at a later date should the Commission determine that the public interest could equally well be served by the public entities assuming ownership and the right to operate facilities." (Pet. App. at 73.) (Footnote omitted.)

To a considerable extent, this is exactly what has happened since 1920. And although the private utilities that have benefitted—for many decades now—from the use of public water power resources may now wish that the law embodied a different policy, the fact is that it does not. The justification for private use of public resources—to facilitate their development—has passed, and the basic and underlying policy of public use of public resources which Congress itself established now should be allowed to come into play.

⁶ See e.g. Sen. Rep. No. 180, 66th Cong., 1st Sess. (1919) (quoted in Pet. App. at 40).

II. IF CERTIORARI IS GRANTED THE CASE SHOULD BE DECIDED ON ITS MERITS

As explained above, SMUD-Cal Cities believes that the petitions for a writ of certiorari may properly be, and should be, denied on the ground that the result below was so clearly correct that the case presents no substantial issue for resolution. In the event that a writ of certiorari is granted, however, SMUD-Cal Cities urges the Court to decide the case on its merits and not to remand it, as has been requested by the Solicitor General.

The question presented here, as the Court of Appeals noted, is "a purely legal question" (Pet. App. 1)—namely, the interpretation of Section 7(a) of the Federal Power Act. No issue of fact or discretion is involved. Nor can "policy" play any role in this case—except insofar as it was set by Congress in the Act. As the Commission itself said in its decision below:

"[T]he principal question to be decided is not the policy issue of whether it is factually or politically wise for States and municipalities to have a relicensing preference against citizen and corporation licensee-applicants, but the legal issue of whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920." (Pet. App. at 23.)

The legal issue has been fully, indeed exhaustively, briefed and argued both before the Commission and in the Court of Appeals. No party has suggested the existence of any "new evidence" that would bear upon the issue. What remains is only for the issue to be finally and definitively resolved. This Court, and only this Court, can provide that resolution.

There is, moreover, a pressing need for prompt resolution of the municipal preference issue. SMUD-Cal

Cities' licensing proceedings, like many others at the Commission, have already been pending for years. In one of those cases, in which a competing application was on file as early as October 1980, the license has already expired without a relicensing decision. The license is now being renewed on an annual basis—to the considerable economic benefit of the existing licensee and to the detriment of SMUD-Cal Cities as the competing applicants. Despite its multi-year pendency, this particular case has not even been set for hearing yet. And it is by no means unusual. The fact is that the Commission's competitive relicensing process has come to a virtual halt as the result of continuing uncertainty about the proper role of the municipal preference in relicensing cases. Additional delay in settling the merits of this issue, especially now that the matter could be decided by this Court, would be wholly unjustifiable.⁷

Finally, in the event that a writ of certiorari is granted, judicial economy also will be served by a decision of this Court on the merits. As all the parties' briefs will surely indicate to the Court, the issue here is not one likely to be abandoned by losers at a lower level of the judicial system. If the issue is not authoritatively resolved now, it gives every promise of having to be resolved authoritatively later. Thus, postponement will not only prejudice parties, like SMUD-Cal Cities, who seek an expeditious resolution of the question; it will also result in unnecessary duplication of judicial effort, certainly in this Court if not in other courts as well.

⁷ As this Court has recently recognized in a not dissimilar context, requiring utilities to proceed in expensive licensing proceedings while potentially controlling legal issues remain unresolved "would impose a palpable and considerable hardship on the utilities, and may ultimately work harm on the citizens" in their service areas. *Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Comm'n*, — U.S. —, 51 U.S.L.W. 4449, 4452 (April 20, 1983).

III. THE CASE SHOULD NOT BE REMANDED UNDER ANY CIRCUMSTANCES

The Solicitor General has suggested that the writ of certiorari be granted in this case but that this Court, rather than considering the case on its merits, should vacate the judgment of the Court of Appeals and remand the case to that court for "such further proceedings as that court deems appropriate." (S.G. Br. at 10.)

The Solicitor General does not assert that any error, either substantive or procedural, was committed by the Commission or by the Court of Appeals, but offers the following as the basic justification for this extraordinary suggestion:

"Following the filing of the instant petitions for certiorari, the Commission met for the purpose of formulating its recommendation to the Solicitor General concerning the Commission's response to the petitions. We are informed that at this meeting, a majority of the Commissioners, four of whom were appointed after the issuance of Opinion Nos. 88 and 88A [the municipal preference opinion and the opinion denying rehearing of the matter], expressed their disagreement with the Commission's earlier position in those orders." (S.G. Br. at 8.)

According to the Solicitor General, the case has been complicated by the facts "that the Commission now wishes to reconsider the case, and that a majority of the Commissioners appear to be ready to overrule Opinion Nos. 88 and 88A and adopt the contrary position." (S.G. Br. at 9.)

It has been the policy of this Court to examine for itself the issues involved in a request that the decision of an appellate court be vacated, even where error is confessed. *See, e.g., Sibron v. New York*, 392 U.S. 40, 58-59 (1967); *Young v. United States*, 315 U.S. 257, 258-59 (1941). That policy should apply with even greater force

here where no error is confessed, and where the request is not only extraordinary but also quite obviously at odds with very basic principles pertaining to the finality, if not the integrity, of the adjudicative process. In this situation, it would be particularly inappropriate for the Court to vacate summarily the Court of Appeals decision without giving the parties an opportunity fully to brief and argue the issue.

The fact is that nothing relevant to the legal issue in this case—which is the only issue in the case—has changed since the time that the Commission, and the Court of Appeals, rendered their final decisions. The relevant provisions of the Federal Power Act remain unchanged as, of course, does the legislative history of those provisions. The pertinent canons of construction and tests for ascertaining legislative intent also remain unchanged. There have been no relevant intervening decisions of this, or any other, Court. And a review of the exhaustive briefing in the case should convince the Court that every argument that could possibly have been made, was made.

All that has changed, as the Solicitor General seems to concede, is the composition of the Commission. Four of the present Commissioners were not involved in the decision sought to be reconsidered. We are aware of no precedent, however, for the proposition that a change in the membership of an administrative agency is a basis for vacating and reconsidering the decision of an admittedly legal (and not political) issue⁸ which has already been the subject not only of a final agency ruling but of a final

⁸ As we have noted, the Commission and the Court of Appeals both described the issue as legal. And neither the petitioners' briefs nor that of the Solicitor General offers any different characterization of it. The Solicitor General says that the case presents "a highly significant question of statutory construction concerning the scope of the state and municipal preference on relicensing in Section 7(a) of the Federal Power Act." (S.G. Br. at 8.)

court of appeals adjudication as well. The Solicitor General, we note, has cited no such precedent.

As we explained in Part II above, there are genuine and substantial reasons, involving both finality and economy of litigation, why this Court should decide the present case on its merits if a writ of certiorari is granted. There are, by contrast, no plausible reasons why the matter, at this stage, should be remanded for reconsideration either by the Court of Appeals or by the Commission. If the Court believes that the issue in the case is significant, and difficult, enough to warrant the grant of the writ of certiorari, the Court should decide the case on its merits, and settle the matter once and for all.

CONCLUSION

For the foregoing reasons, the *amici curiae*, SMUD-Cal Cities, request that the petitions for a writ of certiorari be denied and, in the alternative, if they are not denied, that the case be set for decision on the merits.

Respectfully submitted,

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May 18, 1983

No. 82-1345

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALABAMA POWER COMPANY, et al,

Petitioners,

v.

**FEDERAL ENERGY REGULATORY
COMMISSION,**

Respondent.

**Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

**BRIEF AMICUS CURIAE OF THE STATE OF OREGON
IN SUPPORT OF PETITIONS FOR
WRIT OF CERTIORARI**

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**BRIEF AMICUS CURIAE OF THE STATE OF OREGON
IN SUPPORT OF PETITIONS FOR
WRIT OF CERTIORARI**

STATEMENT OF THE CASE

This case presents the issue of the proper interpretation of Section 7(a) of the Federal Power Act, 16 USC § 800(a), which gives a preference to states and municipalities in the licensing of hydroelectric power projects. The petitioners contend that this preference does not apply in a relicensing proceeding against the "original licensee" applying for a license renewal.

The Federal Energy Regulatory Commission (FERC) held, in a declaratory ruling, that

"the preference of Section 7(a) of the [Federal Power Act] favoring States and municipalities over citizens and corporations is applicable to all relicensing applications in which States or municipalities, and citizens or corporations, request successor licenses for the same water resources. . . ." *City of Bountiful, Utah* (Opinion No. 88), No. EL 78-43, p 10 (June 27, 1980).

The petitioners appealed, and the United States Circuit Court of Appeals for the Eleventh Circuit affirmed the FERC's order. *Alabama Power Co. v. FERC*, 685 F2d 1311 (1982).

The State of Oregon files this *amicus curiae* brief in support of the petitions for a writ of certiorari submitted by the petitioners in this case.

INTEREST OF AMICUS CURIAE, THE STATE OF OREGON

Oregon appears in this case to represent and to protect the economic interests of its residents, businesses and industries. Oregonians depend upon an adequate and affordable supply of electricity to operate their homes, stores and factories. The energy needs of a majority of Oregonians currently are served by privately owned energy suppliers which are subject to comprehensive state regulation. The ability of those utilities to renew current hydroelectric power project licenses will be adversely affected by the Court of Appeals' decision in this matter. The continued availability of inexpensive hydroelectric power to Oregon's energy suppliers is a

matter of vital importance to the state in its effort to assure an adequate supply of low-cost electricity for its people.

SUMMARY OF ARGUMENT

Oregon urges this Court to review the decision below because of its important legal and practical consequences. The Court of Appeals' interpretation of the public utility preference of Section 7(a) of the Federal Power Act, 16 USC § 800(a), should be reviewed and rejected as legally incorrect. The Court of Appeals' decision fails to give effect to the plain and unambiguous language of the statute. Moreover, the practical economic effects of the lower court's decision are immense and adverse. It gives public utilities a significant advantage in competitive proceedings for the relicensing of existing hydroelectric plants owned by investor-owned utilities. As a practical matter, it allows public utilities to acquire investor-owned plants by paying to the "original licensee" only the net cost of the plants plus severance damages; an amount considerably less than the cost of constructing replacement power plants today.

The statutory interpretation embraced by FERC and the Court of Appeals unfairly would redistribute the benefits of our nation's hydropower resources to publicly owned utilities and their customers at considerable loss and expense to those electricity

consumers who are served by investor-owned utilities. Allowing publicly owned utilities to acquire the hydroelectric plants of state-regulated, investor-owned utilities would have substantial adverse economic effects in Oregon. Congress clearly did not intend to sanction or to require such a shift of economic burdens to customers of investor-owned utilities.

ARGUMENT

Reasons for Granting the Writ

I. This case presents an important question of federal law.

The Court of Appeals' interpretation of the public utility preference will have significant effects on the future distribution of the benefits of low-cost hydroelectric power resources between the segments of the populace served by investor-owned utilities and those served by publicly owned utilities. The proper interpretation of the preference is of vital importance to the people and businesses of the State of Oregon, 80 percent of whom are served by investor-owned utilities.

The state's two largest investor-owned electric utilities, petitioner Pacific Power and Light Company (PP&L) and intervenor Portland General Electric Company (PGE), derive a significant portion of their power (16-17 percent) from their hydroelectric projects. These projects produce relatively

inexpensive electricity compared to coal-fired, gas-fired and oil-fired thermal plants, and nuclear plants.

The hydroelectric projects licensed to investor-owned utilities were paid for in large part by inclusion of depreciation charges and return of original investments in calculating customer rates. Thus, the large majority of Oregonians who are served by investor-owned utilities have a substantial interest in seeing PP&L and PGE retain these plants as part of their power supply systems so that the ratepayers will continue to share the benefits of the cheaper power derived from the plants. Oregon law provides that the rates charged by investor-owned electric utilities must be based upon the actual cost of the power sold. This provision ensures that the benefits of low-cost hydroelectric power are passed on to the utilities' customers.

The Court of Appeals' interpretation of the public utility preference, and the resulting redistribution of hydropower benefits from the customers served by investor-owned utilities to those served by publicly owned utilities, would have the following substantial adverse economic impacts on the former group of electricity consumers:

1. Loss of hydroelectric plants by the investor-owned utilities would necessitate the construction of replacement power plants at current high construc-

tion costs, resulting in significantly higher electricity rates.

2. The takeover of investor-owned utilities' hydroelectric plants by publicly owned utilities would discourage businesses and industries from locating, or staying, in the State of Oregon, 80 percent of which is served by investor-owned utilities. In the Pacific Northwest, most publicly owned utilities are "preference customers" of the Bonneville Power Administration (BPA). As such, they enjoy access to large amounts of low-cost federal hydroelectric power. *See* Bonneville Project Act, 16 USC § 832a *et seq.* In contrast, the commercial and industrial electricity rates of investor-owned utilities in Oregon presently are 48 to 142 percent higher than those charged by BPA preference customers in nearby service territories. The transfer of hydroelectric plants to publicly owned utilities would concentrate, rather than spread, hydropower benefits, contrary to the stated purposes of the Federal Power Act. *See* 16 USC § 824a(a); *NAACP v. Federal Power Commission*, 425 US 662, 669-670 n 5, 96 S Ct 1806, 48 L Ed2d 284 (1976). Transfer of power plants currently licensed to investor-owned utilities to public utilities would exacerbate the already large rate disparities between investor-owned and publicly owned utilities and thereby would place Oregon at an even greater disadvantage in attracting and

retaining businesses and industries as compared to neighboring states served by publicly owned utilities. There has been virtually no growth in PP&L's electric sales to industrial customers in Oregon in the last ten years.

Questions concerning the scope of the public utility preference of Section 7(a) of the Federal Power Act, 16 USC § 800(a), were presented to this Court in *Washington Public Power Supply System v. Federal Power Commission*, 387 US 428, 87 S Ct 1712, 18 L Ed2d 869 (1967). However, because this Court reversed the Court of Appeals' judgment and directed that the case be remanded to the FERC for further proceedings, it did not reach the questions. 387 US at 451. This case presents another opportunity to consider and address important questions of federal law relating to the scope of the public utility preference.

II. The Court of Appeals erred in not giving effect to the plain and unambiguous language of the statute.

Section 7(a) of the Federal Power Act provides:

"(a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and *in issuing licenses to new licensees under section 15 of this title the Commission shall give preference to applications therefor by States and municipalities*, provided, the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well

adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans." (Emphasis added.) 16 USC § 800(a).

The legal question presented in this case is whether an investor-owned utility "original licensee," who is an applicant in a hydroelectric project relicensing proceeding, is a "new licensee," within the meaning of Section 7(a), for purposes of the public utility preference provided therein.

Section 15 of the Federal Power Act provides, in pertinent part:

"(a) If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 of this title, the commission is authorized to issue a new license to the *original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, *or* to issue a new license under said terms and conditions to a *new licensee*, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 14 of this title: Provided, that in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the

original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid." (Emphasis added.) 16 USC § 808(a).

Section 15(a) clearly distinguishes between issuing a new license to the "original licensee" and issuing a new license to a "new licensee." The latter term, as used in Sections 15(a) and 7(a), plainly does not include the "original licensee." Thus, the Court of Appeals erred in not giving effect to the plain and unambiguous language of the statute. *Tennessee Valley Authority v. Hill*, 437 US 153, 184 n 29, 98 S Ct 2279, 57 L Ed2d 117 (1978).

CONCLUSION

The Court should review this case because of the substantial interest of electricity consumers in Oregon and the rest of the country in the future distribution of the benefits of our nation's low-cost hydroelectric power. The Court of Appeals' interpretation of the public utility preference of Section 7(a) of the Federal Power Act, 16 USC § 800(a), is wrong and should not be permitted to stand. The lower court failed to give effect to the plain and unambiguous language of the statute. Its strained construction of the Act gives public utilities a significant advantage in competitive proceedings for the relicensing of existing hydroelectric plants owned by

investor-owned utilities. The lower court's holding would permit public utilities to acquire investor-owned utility plants at bargain prices, at the expense of the ratepayers of the current licensees. Congress cannot have intended such an inequitable result. The petitions for writ of certiorari should be granted and the Court should address the simple, yet enormously significant issue of statutory construction which this case presents.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

PACIFIC GAS AND ELECTRIC COMPANY, *et al.*,
Petitioners,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

MOTION OF AMERICAN FARM BUREAU
FEDERATION AND CALIFORNIA
FARM BUREAU FEDERATION
FOR LEAVE TO FILE BRIEF AMICI CURIAE,
AND BRIEF AMICI CURIAE
IN SUPPORT OF PETITIONERS

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No. 82-1346

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Petition for a Writ of Certiorari
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**MOTION OF AMERICAN FARM BUREAU
FEDERATION AND CALIFORNIA
FARM BUREAU FEDERATION
FOR LEAVE TO FILE BRIEF AMICI CURIAE,
AND BRIEF AMICI CURIAE
IN SUPPORT OF PETITIONERS**

American Farm Bureau Federation and the California Farm Bureau Federation respectfully move this Court for leave to file the accompanying brief amici curiae in support of Petitioners' position in this case.

**INTEREST OF AMERICAN FARM BUREAU
FEDERATION AND INTEREST OF
CALIFORNIA FARM BUREAU FEDERATION**

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization organized in 1919 under the "General Not For Profit Corporation Act" of

the State of Illinois with its principal office in Park Ridge, Illinois. AFBF has as its purpose the promotion, protection and representation of the business, economic, social and educational interests of the farmers and ranchers of the United States. It has member state Farm Bureau organizations in 48 states and in Puerto Rico, representing more than 3 million member families.

The interest of AFBF in this case is to represent and protect the economic interest of Farm Bureau members across this nation who depend upon an adequate, continuous and affordable source of electricity to operate their farms and ranches and who will be adversely impacted by the ruling of the Court of Appeals for the Eleventh Circuit in this matter.

In addition, the AFBF voting delegates from its 48 member state Farm Bureaus and Puerto Rico assembled in annual meeting in Dallas, Texas, January 12, 1983, adopted the following policy:

We favor federal relicensing of hydro-electric generation facilities in a manner which will protect agriculture's interest in maintaining the availability of lowest cost energy. The entity which constructed and operated the generation facility during the original license period should be given a preference for the license extension. Only in this manner can the most encouragement be given for risk ventures for construction of future hydro-electric facilities.

The California Farm Bureau Federation is a voluntary, nongovernmental, nonprofit California corporation. Its primary purpose is to protect and foster agricultural interests throughout the State of California. Its members consist of 52 county Farm Bureaus with a combined membership at the close of its 1982 membership year of over 99,000 families. Over 85% of all commercial farmers in

the State of California are members of the county Farm Bureaus.

California Farm Bureau Federation seeks this Court's permission to express its views in this case because this Court's disposition herein of the question regarding the construction of the Federal Power Act (the "Act"), 16 U.S.C. § 79(a) *et seq.*, and more particularly, section 7(a) of the Act, 16 U.S.C. § 800(a), will profoundly affect the availability of lowest cost energy to agriculture.

SUBSTANCE OF THE BRIEF AMICI CURIAE

The brief amici curiae, herein, discusses the statutory construction of section 7(a) in conjunction with section 15(a) [16 U.S.C. § 800(a) and 16 U.S.C. § 808(a), respectively] of the Federal Power Act [16 U.S.C. § 79(a) *et seq.*].

The brief argues that the plain meaning of the Act does not give States and municipal applicants a licensing preference nor an engendering right to acquire projects from an original private utility licensee at less than market value at the time of relicensing of a private utility project under the Act. Furthermore, this construction of the Act is consistent with and furthers legislative policy and purpose, does not unfairly reallocate a benefit to one segment of this nation's power consumers at considerable loss and expense to another segment, and is not ambiguous. In addition, this Court need not give undue weight and great deference to a construction of the Act by the Federal Energy Regulatory Commission (herein Commission) which was not contemporaneous with the Act's enactment, which was not consistent with its prior construction, and which frustrates the policy Congress sought to implement.

REASONS FOR GRANTING THIS MOTION

California agriculture, and the rural community of which it is a part, in the main, derives its power from privately

owned utility companies. Similarly, nationwide, American agriculture depends upon a continuous and affordable source of electric power, much of which is supplied by private utilities.

Hydroelectric power is the cheapest major source of electrical power production in the United States. The sector of the public which is serviced by privately owned utilities shares the benefits of the cheaper power, to the extent that its utility supplier derives power from the supplier's own hydroelectric plants. In this respect, the Public Utility Commission regulations of various states mandate that rates charged by investor owned utilities be commensurate with actual cost of the power sold, thus making sure that the benefits of cheap production cost pass through to the constituent consumers.

The construction given to the statute in question by the Federal Energy Regulatory Commission and the Court of Appeals has the effect of not only giving the states and/or municipalities preference on relicensure of existing investor owned hydroelectric plants, but of also allowing municipalities to acquire those plants by paying only net cost plus severance damages to the private utility. This amounts to considerably less than "just compensation" or the "fair market value" for these facilities. The consequential impact of shifting the hydroelectric plant low cost energy benefits from one segment of the populace to another segment, without the acquiring segment having to pay the fair market value for the facilities, would work an extreme hardship on the utility customers in the following respect. Loss of a hydroelectric plant would cause an increase in average fuel costs resulting in higher customer rates. Additionally, the private utility would have to develop alternative power sources, at considerable cost to its consumers, particularly since it would not have recouped replacement capital from the transfer of the facility to the acquiring municipality. Then, finally, the utilities' pur-

chase of surplus power from other suppliers, if available, could approximate "avoided cost" or the price to the acquiring company of fuel generated power. Conceivably, at bargain basement prices, a municipality could acquire hydroelectric plants in excess of its consumer needs, market the surplus energy at a profit and thus subsidize its customers' power expense at the expense of other segments of the public. Presumably, this would be at great expense to agriculture and the rural consumer.

The social and economic impact of preferring the municipalities and their predominately urban consumer over the investor owned utilities and their consumers, including agricultural consumers, cannot be overstated. Likewise, one cannot overstate the significance of the role of this Court in deciding the issues presented herein.

WHEREFORE, the American Farm Bureau Federation and the California Farm Bureau Federation respectfully move this Court for leave to file the accompanying brief amici curiae.

Respectfully submitted,

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No. 82-1346

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BRIEF OF AMICI CURIAE
AMERICAN FARM BUREAU FEDERATION AND
CALIFORNIA FARM BUREAU FEDERATION

American Farm Bureau Federation and California Farm Bureau Federation respectfully submit this brief in support of Petitioners' position.

INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

A statement describing the American Farm Bureau Federation and the California Farm Bureau Federation and their interest herein is set forth in the preceding motion requesting leave to file this brief amici curiae. Likewise, a summary of the following arguments is set forth in the preceding motion under the heading "Substance of the Brief Amici Curiae."

ARGUMENT

I

THE CLEAR UNAMBIGUOUS LANGUAGE OF THE STATUTE IS CONTROLLING

In interpreting a statute, the court must look first at the language of the statute itself.¹ If clear and unambiguous, the inquiry regarding interpretation stops as there is nothing to construe.² The issue now before the Court is whether the term "new licensee" as used in Section 7(a) of the Federal Power Act,³ includes within its scope a private power company "original licensee" against whom a state or municipal preference would apply at the time of issuance of a subsequent license to that private company's facility. The pertinent part of Section 7(a) reads as follows " . . . in issuing licenses to new licensees under section 15 of this title, the Commission shall give preference to applications therefor by States and municipalities. . . ."

¹United States v. Standard Brewery, 251 U.S. 210, 217 (1920).

²United States v. Fisher, No. 2 Cranch, 358, 386 (1864); Lewis v. United States, 92 U.S. 618, 621 (1876); *also see* Browder v. United States, 312 U.S. 335, 338 (1940).

³16 U.S.C. § 800(a).

⁴Section 7(a) of the Federal Power Act states in full:

(a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 of this title the Commission shall give preference to applications therefor by States and municipalities, provided, the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

16 U.S.C. § 800(a).

Since the words "new licensees" as used in Section 7(a) are clearly cross-referenced to Section 15 of the Act, one must turn to that section for illumination of the meaning and use of the words. Section 15 points out that the Commission is authorized *at the time of expiration* of the original license to issue a "new license" to the "original licensee" or to issue a "new license" to a "new licensee."⁵ At the time in question, namely the expiration of an original license, Section 15 clearly distinguishes between issuing a new license to the original licensee and issuing a new license to a new licensee. The terms set forth two classes of applicants in contradistinction to each other, and in no way does the term "new licensee" as used in this section include the "original licensee."

Where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the

⁵Section 15(a) of the Federal Power Act, (16 U.S.C. § 808(a)) states as follows:

(a) If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 of this title, the commission is authorized to issue a new license to the *original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a *new licensee*, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 14 of this title: Provided, that in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid. (Emphasis added.)

same sense throughout, and where its meaning is clear, this meaning will be attached to it elsewhere.⁶ It follows, then, that the terms "new licensee" as used in Sections 15(a) and 7(a) have the same meaning and sense and that the term "new licensee" in Section 7(a) does not include an original licensee within the class against whom a preference applies. At this point it becomes, as the Court said in *Boudinot v. United States (Cherokee Tobacco)*⁷, "the duty of the courts to execute the statute (cites omitted). Further discussion of the subject is unnecessary. We think it would be like trying to prove a self-evident truth. The effort may confuse and obscure but cannot enlighten."⁸

II

ASSUMING ARGUENDO, THAT THE TERM "NEW LICENSEE" IS AMBIGUOUS, THEN THE CONSTRUCTION SET FORTH, SUPRA, THAT THERE IS NO PREFERENCE TO A STATE OR MUNICIPAL APPLICANT AT THE TIME OF EXPIRATION OF AN ORIGINAL LICENSE AS AGAINST A PRIVATE UTILITY, IS CONSISTENT WITH AND FURTHERS THE LEGISLATIVE PURPOSE AND POLICY

In 1920 when the legislation was enacted, the major problem the legislature was trying to remedy was the urgent need to tap the availability of hydroelectric power for the economic benefit of the entire public. The "means" available to utilize this natural resource were either direct government development with its concomittant expenditures of taxpayer dollars, or government regulated private

⁶See *Gonzales v. Barber*, (9th Cir.,) 207 F.2d 398, 402 (1953), affirmed 347 U.S. 637; *United States v. Montgomery Ward & Company*, (7th Cir.,) 150 F.2d 369, 376, 377 (1945), vacated on other grounds 326 U.S. 690.

⁷*Boudinot v. United States (Cherokee Tobacco)*, 11 Wall 616; 78 U.S. 227 (1870).

⁸*Id.* at 620, 78 U.S. at 229.

development through the investment and expenditure of private capital. The need and the alternative remedies were clearly set forth in Senate Report No. 180, 66th Congress, 1st Session, in 1919 wherein it states that:

Every year that our water powers are underdeveloped means a loss to the people in one form or another, almost, if not quite, equal to the cost of their development. Legislative action should be delayed no longer. We should do one of two things: We should pass legislation which will lead private capital and enterprise to develop these resources under such regulations as will give consumers good services and cheap power, or the Government itself should proceed to make this development. This bill proceeds on the theory of private development with ultimate public ownership possible.

The need for cheap energy in this country was not satiated by the initial construction, some fifty years ago, of hydroelectric power plants by the private sector. Such a need continues, as does the need for private development of additional energy production capacity. Indeed, the capital requirements associated with the ever expanding need for power in this country, coupled with the more highly sensitive integration problems facing power production in terms of pollution and other ecology concerns, flood control, recreation, and industrial water needs in this expanded society necessitate even larger proportionate costs for the development of hydroelectric power facilities. As is evidenced in the case of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-72 (1978), the ultimate product of the Act reflects the countervailing means and purposes that the members of Congress sought to achieve. The

language in the Act was clearly the result of compromise, and it is the task of this Court to give effect to the statute as enacted.⁹

The Act when viewed as a whole demonstrates the compromise of the above stated competing objectives and "means" as follows:

A. Provisions under the Act which provide for possible governmental development of hydroelectric facilities or for governmental regulation of the facilities include:

1. A preference for states and municipalities for initial development in all cases where no preliminary permit has been issued previously (Section 7(a)).

2. A preference for states and municipalities on relicensing against all applicants except the original licensee (Sections 7(a) and 15(a) and Argument I, *supra*).

3. The right of the United States to recapture any of the projects upon expiration of the original license issued to a private company (Section 14(a)).¹⁰

4. The right of the United States or any state or municipality to take over any project licensed under the Act by the process of condemnation upon payment of just compensation (Section 14(a)).

5. The Commission's power to issue licenses only to those applicants who have developed plans that best serve the public interest as determined by the Commission. (Section 7(a), *also see* Section 10(a) and (b), 16 U.S.C. § 803(a) and (b) and Section 11, 16 U.S.C. § 804.)

⁹*Also see* United States v. Sisson, 399 U.S. 267, 297-298 (1970); Boys Market v. Retail Clerks Union, 398 U.S. 235, 250-253 (1970).

¹⁰*See* note 11 *infra* for text of Section 14(a), 16 U.S.C. 807(a).

B. The provisions of the Act which encourage and promote the investment in and development of power resources by private enterprise includes:

1. No municipal preference to apply against a private company where a preliminary permit has been issued (Section 7(a)).

2. Protection against Commission alteration of the license during the license term and protection against any adverse changes in the Act during the license term (Section 6, 16 U.S.C. 799, and Section 28, 16 U.S.C. 822.)

3. No municipal preference to apply against an original private company licensee on application for a new license after expiration of an existing license (Section 7(a) and 15(a) and Argument I, *supra*).

As is readily apparent from reading the provisions of the Act, the legislature has reserved to the states the power of condemnation. If therefore, under the Act, a state or authorized municipality may at any time condemn and take over a hydroelectric plant licensed under the Act, what is the true significance behind a construction of the sections in question that would give a municipal preference on relicensing of a private utility plant? The bottom line in this case is dollars. Rather than having to pay "just compensation" for the facilities, a municipality could take over a private facility and with the rights engendered to it under Section 14(a) through Section 15(a) the municipality would need only pay the "net value plus severance damages."¹¹ It is understood that this latter value could

¹¹Section 14(a) provides in pertinent part as follows:

. . . the United States shall have the right upon or after the expiration of any license to take over . . . any project . . . upon the condition that before taking possession it *shall pay the net investment* of the licensee in the project or projects taken, not to exceed the fair value of the property taken, *plus such reasonable damages*, if any, to property of the licensee valuable,

conceivably be little or nothing. A construction which allows a municipal preference at the time of relicensing of a private utility, in tandem, also allows for a forfeiture on the part of private enterprise of its capital investment without receiving just compensation. The best construction of the Act is one which avoids a forfeiture.¹²

In this respect, a private company must virtually give away its capital investment. The results are that it has no means except through higher prices passed through to the consumer to purchase replacement power generation facilities or the private company would have to obtain additional debt and equity financing for the new acquisition or development. The consumers served by the private utility would have to pay the costs of the debt interest and equity earnings in the form of increased power rates set by state Public Utilities Commissions. All this, in addition to the immediate increase in average fuel cost due to loss of a facility which uses no fuel. Conceivably, for every one dollar in market value lost to a municipality which does

serviceable, and dependent as above set forth but not taken, *as may be caused by the severance therefrom of property taken*, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. *Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this chapter, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: Provided, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter at any time by condemnation proceedings upon payment of just compensation is expressly reserved.* (Emphasis added.) 16 U.S.C. § 807(a).

¹²Farmers' & M. National Bank v. Dearing, 91 U.S. 29, 35 (1875).

not pay "just compensation," the private company and its constituent consumers would have to pay several dollars in replacement dollars in the form of higher electric rates. This occasions an even larger loss to the private company's consumers, specifically including major segments of American agriculture.

It is clear that private enterprise would not be willing to invest large sums of capital in the development of hydroelectric power where that capital would be subject to future forfeiture. An interpretation of the Act which allows for such forfeiture, clearly thwarts the objective of stimulating private enterprise to assist in the development of hydroelectric power facilities. On the other hand, the fact that the legislature expressly reserves to municipalities and states the powers of condemnation and eminent domain is consistent with the stated policy of "private development with ultimate public ownership possible." When reading the Act as a whole, the condemnation provision coupled with the non-preference construction urged heretofore, provides for a workable integration of the competing methods of achieving hydroelectric power development in this country.

Contrarywise, the construction urged by the Federal Energy Regulatory Commission's opinion defeats the goals of the legislature by allowing States and municipalities to take over existing plants pursuant to a preference upon relicensure. It is entirely possible that the states and municipalities will satiate their power needs through this acquisition process, thus reducing any desire or need for them to invest or develop additional hydroelectric facilities and, in the meantime, private enterprise is going to be extremely reluctant to invest capital which is subject to future forfeiture and loss. Indeed, rather than developing hydroelectric facilities, private enterprise would tend to invest in other types of energy producing plants, all at a greater cost to the consumer.

As to the risk of future forfeiture and loss, it should be noted that the potential risk of loss by private companies to one entity, namely the United States Government (as entailed in Section 14's allowance for take over by the United States with specific Congressional authorization), is entirely different in scope and inevitability as compared to the scope of the risk of loss by the private company to a stampede of various state municipalities all trying to grab the merchandise at a bargain basement sale.

Where Congress seeks to promote dual objectives in a single statute, courts must be most hesitant to infer from its silence a cause of action that while serving one legislative purpose will disserve the other.¹³ A construction which omits "original licensee" from inclusion in the term "new licensee" as it relates to the municipal preference in Section 7(a) preserves the two-fold method of achieving hydroelectric power production and development. It serves to stimulate continuing private enterprise development, provides for the "possibility of public ownership" through condemnation or through competition on the merits with an original licensee, and provides for additional resource development by the public entities. In addition, the conditional licensing feature of the Act continues to provide for public policy implementation in the broadest sense, by providing for new terms and conditions upon the issuance of new licenses. It further provides a means for both updating the systems and expanding the facilities' interface with the environment in such a way as to meet the needs of the public.

On the other hand, what the Federal Energy Regulatory Commission is asking "is not a construction of a statute, but, in effect, an enlargement of it by the court, so that

¹³*Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 (1978); *United States v. Sisson*, 339 U.S. 267, 298 (1970); *Also see Kokoszka v. Belford*, 417 U.S. 642, 646, 650-651 (1974).

what was omitted, presumably by inadvertence, may be included within its scope."¹⁴ The legislature did not include the original licensees in the class of new licensees against whom a municipal preference applies. This Court should not enlarge the Act by including what was omitted.

Finally, the plain meaning of the Act as set forth, *supra*, implements completely the duality of "means" utilized by the legislature to achieve hydroelectric power development, and at the same time, (a) maintains stability in the current economic situation of the public relying upon privately produced power, (b) maintains a system of distribution of the benefits of cheap energy which is regulated and passed through to public consumers, (c) avoids a forfeiture so long as private companies are willing to meet the expanded needs and conditions for a relicensing, (d) allows for municipalities to take over hydroelectric facilities through just compensation condemnation proceedings, (e) continues to provide incentives for future development of cheap hydroelectric power through the use of private capital as well as public capital, and (f) honors the reliance factor of private utilities who invested funds with a plain meaning construction of the Act in mind as hereinabove urged upon this Court. It is clear that the construction of the term "new licensees" to exclude "original licensees" is consistent with the objectives and policy of the laws indicated by the various provisions of the Act, and will have the effect of carrying into execution the will of the legislature.¹⁵

¹⁴*Iselin v. United States*, 270 U.S. 245, 251 (1926).

¹⁵*Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

III

**THE ADMINISTRATIVE INTERPRETATION OF A
STATUTE WHICH IS NEWLY MADE, NOT LONG-
STANDING, NOR CONTEMPORANEOUS WITH THE
ENACTMENT, AND NOT CONSISTENT WITH PRIOR
INTERPRETATIONS IS NOT TO BE GIVEN ANY
OFFICIAL WEIGHT BY THE COURT**

In the case of *Walling v. Swift & Company*, (7th Cir.) 131 F.2d 249, at 252 (1942), the Court held that an administrative decision which is newly made and challenged at the earliest opportunity is not to be given any special weight by the courts in their construction of the statute. Furthermore, administrative agency rulings, interpretations, and opinions are not controlling upon the courts by reason of their authority, but rather constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance, with their weight being dependent in a particular case upon the thoroughness evident in the agency's consideration, the validity of the agency's reasoning and its consistency with earlier pronouncements.¹⁶ Indeed, the courts are the final authorities on issues of statutory construction and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that are inconsistent with the statutory mandate or that frustrate the congressional policy.¹⁷ The amount of deference to be given an administrative agency's interpretation of a statute varies in degrees commensurate with such factors as the timing and

¹⁶*General Electric Company v. Gilbert*, 429 U.S. 125, 141-142 (1976); *Skidmore v. Swift & Company*, 323 U.S. 134, 140 (1944); *also see United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 665, 674 (1973).

¹⁷*Securities and Exchange Com. v. Sloan*, 436 U.S. 103, 118 (1970); *Federal Maritime Comm. v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-746 (1973).

consistency of the agency's position.¹⁸ In this vein, an administrative interpretation of a statute which has not been uniform, is not entitled to the respect and weight accorded to a uniform construction.¹⁹

Finally, while an agency's interpretation of the statute under which it operates is entitled to some deference, this deference is constrained by the United States Supreme Court's obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history.²⁰

In the case at bar, the interpretation of the Act by the Federal Energy Regulatory Commission is newly made and was challenged at the earliest opportunity and therefore is not to be given any special weight by the courts in their construction of the Act.²¹ The construction of the Act given by the Commission in June of 1980, some sixty years after the enactment of the legislation, can hardly be said to be contemporaneous. Furthermore, in 1968, at the time that Section 7 and Section 15 of the Act were amended, the Commission in its report to Congress offered a reverse interpretation of the preference when it stated:

Under section 7(a) of the Federal Power Act, the Commission is instructed to give preference to applications by States and municipalities in issuing licenses to new licensees under section 15. Our General Counsel has advised us that this preference applies only after it has been determined that the original licensee should not receive a new license. In those instances where

¹⁸*Batterson v. Francis*, 432 U.S. 416, 425 n. 9 and cases cited *thereunder* (1977).

¹⁹*United States v. Missouri P. R. Co.*, 278 U.S. 269, 280 (1928); *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16 (1931).

²⁰*Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979).

²¹*Walling v. Swift & Company*, (7th Cir.) 131 F.2d 249, 252 (1942).

the original licensee and another applicant seek a new license for the same project, the Commission believes that the new license is to be issued to whichever applicant can best meet the standards of the act. In those rare cases where the two applicants are equally matched, the Commission believes that the new license should be issued to the original licensee so long as he can meet the standards of the act at least as well as the other applicant. (House Report Number 1643, 90th Cong. (1968).)

Accordingly, there simply has not been the consistency required to give deference to the current administrative interpretation of Section 7(a) and 15(a) of the Act. It appears that the Court of Appeals gave the Commission's interpretation deference as a substitute for the Court exercising its obligation as the final authority on the issues presented. In this sense, the Court of Appeals decision amounted to a mere rubber-stamp of the administrative decision.²²

Finally, even assuming *arguendo*, that there was some deference that could be afforded the recent decision by the Commission, this deference is constrained by the United States Supreme Court's obligation to honor the clear meaning of the Act as revealed by its language, purpose and history.²³ The clear meaning of the Act has been set forth, *supra*, in Arguments I and II. Accordingly, the construction given the Act in the Court below must be reversed.

²²Cases cited note 17 *supra*.

²³Case cited note 20 *supra*.

CONCLUSION

In the case at bar the Federal Energy Regulatory Commission and the Court of Appeals incorrectly construed the statutes in question in such a way as to (a) do violence to the plain meaning of the words used in the Act, (b) thwart the policy and purpose of the legislature, (c) destroy the compromise and shift the balance between competing policies in the Act as struck by the legislature in its enactment, in the process promoting forfeitures and threatening great expense and injustice to the public sector served by private utilities. Additionally, the Court of Appeals incorrectly gave undue weight to a noncontemporaneous, nonconsistent, administrative interpretation of the Act.

WHEREFORE, amici curiae, American Farm Bureau Federation and California Farm Bureau Federation respectfully pray that this Court grant the writ of certiorari and reverse the decision below.

Respectfully submitted,

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No. 82-1346

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

PACIFIC GAS AND ELECTRIC COMPANY, *et al.*,
Petitioners,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

**MOTION OF THE PUBLIC UTILITIES
COMMISSION OF THE STATE OF CALIFORNIA
FOR LEAVE TO FILE AS AMICUS CURIAE
A BRIEF IN SUPPORT OF PETITIONERS
and
BRIEF OF THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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**MOTION OF THE PUBLIC UTILITIES
COMMISSION OF THE STATE OF CALIFORNIA
FOR LEAVE TO FILE AS AMICUS CURIAE
A BRIEF IN SUPPORT OF PETITIONERS**

Pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States, the Public Utilities Commission of the State of California ("CPUC") moves this Court for leave to file as amicus curiae the accompanying brief. This motion is made necessary because all parties to the proceedings below did not consent to the filing of this brief.

The CPUC is an administrative agency established under the Constitution and laws of the State of California. Among its duties, the CPUC exercises regulatory jurisdiction over privately-owned electrical utilities providing retail service within California. By law, the CPUC is authorized to represent the customers of these electrical utilities in proceedings such as those presently before this Court for review.

Pacific Gas and Electric Company ("PG&E"), petitioner to this Court, is a privately-owned electrical utility subject to the jurisdiction of the CPUC. It serves some 3.5 million customers in California. Twenty percent of its total generating capacity is provided by hydroelectric projects licensed by the Federal Energy Regulatory Commission ("FERC"). The annual value of the power generated by these projects is approximately \$800 million.

In the judgment before this Court for review, the United States Court of Appeals for the Eleventh Circuit affirmed an order of the FERC which would make possible the forced transfer of those projects and hundreds of others throughout the nation without payment of their cost of replacement and without any showing that the public interest would be better served thereby. Despite the highly serious ramifications of that order on the service provided to and the rates paid by retail electrical customers, however, the court of appeals did not undertake on its own to interpret the pertinent statutory provisions. Rather, it simply deferred to the FERC's interpretation.

WHEREFORE, given the vital importance of the FERC's order, and the lack of meaningful review accorded

it by the court of appeals, the CPUC moves this Court for leave to file as amicus curiae the accompanying brief.

Respectfully submitted,

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BRIEF OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Public Utilities Commission of the State of California ("CPUC") submits as amicus curiae this brief in support of petitioners, Pacific Gas and Electric Company ("PG&E"), *et al.*, who seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit issued in this case on September 17, 1982.

STATEMENT OF THE CASE

Part I of the Federal Power Act ("FPA"), known as the Federal Water Power Act of 1920 ("FWPA") until recodified by the Public Utilities Act of 1935, establishes a comprehensive scheme for the development of the nation's hydroelectric resources. 16 U.S.C. § 791a *et seq.* Section 4(a) authorizes the Federal Energy Regulatory Commission ("Commission" or "FERC") to issue licenses for the pur-

pose of such development. 16 U.S.C. § 797(e). 16 U.S.C. § 803(a). Section 14(a) grants to the United States on expiration of any license the right to take over the project on condition that it pay to the licensee net investment in the project plus reasonable severance damages and reserves to the United States, the individual States, and all municipalities the right to take over any project at any time by condemnation on payment of just compensation. 16 U.S.C. § 807(a). Section 15(a) authorizes the FERC on expiration of an original license, if the United States does not exercise its right of take-over, to issue a new license to either the original licensee or a new licensee—on condition that the new licensee pay to the original licensee net investment in the project plus reasonable severance damages. 16 U.S.C. § 808(a). Section 7(a) directs the FERC “in issuing licenses to new licensees under section 15” to give preference to applications by States and municipalities,

provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region. . . .

16 U.S.C. § 800(a).

On July 21, 1978, the City of Bountiful, Utah, petitioned the FERC for a declaratory order that this preference for public agencies applies not only when an original license is issued, but also on expiration of that license whenever a new license is issued. On August 15, 1978, a similar petition was filed by the City of Santa Clara, California. By notice issued on September 27, 1978, the FERC consolidated those petitions in Docket No. EL78-43.

On June 27, 1980, in that consolidated proceeding, the FERC issued Opinion No. 88 in which it declared that the

preference provided public agencies under Section 7(a) applies whenever a new license is issued. "Opinion and Order Declaring Municipal Preference Applicable to Hydro-Electric Relicensings," slip op. at 10. In reaching that conclusion, the FERC first rejected arguments by PG&E and other privately-owned utilities that, since Section 15(a) distinguishes between the terms, this preference cannot logically apply against "original licensees," but only against "new licensees." Such arguments fail, in the view expressed by the FERC, because the term "new licensee" is used in a different context in Section 7(a) than in Section 15(a). *Id.* at 42. That is, Section 15(a) concerns "predecessor/successor relationships in a context of successive license terms" and Section 7(a) "the single license term under consideration." *Id.* at 46-47. Moreover, according to the FERC, no reason exists why the term "new licensee" should be given the same meaning when used alone in Section 7(a) as when used in correlation with the term "original licensee" in Section 15(a). *Id.* at 46. Nonetheless, so the FERC believed, sufficient ambiguity exists regarding the term "new licensee" so as to compel resort to the legislative history of the FWPA. *Id.* at 47. Taking that resort, the FERC interpreted the absence of an express inclusion or exclusion in Section 7(a) of "successor licenses" as indication that Congress intended that the preference for public agencies apply whenever a new license is issued. *Id.* at 48.

In determining which among competing applications for a new license would thus best serve the public interest, the FERC will, it went on to explain, consider a variety of factors. *Id.* First, since the FPA does not limit the FERC's focus merely to physical and technical factors, the public interest should be viewed in its broadest sense, including

social impacts such as economic costs and benefits. *Id.* at 59-60. Second, because it was not intended by Congress to be a static concept, the public interest will vary with time and circumstances. *Id.* at 60. Third, to the extent that transfer would cause effects not present on initial licensing, the public interest will be more complex and complicated to evaluate when a successor license is issued. *Id.* Fourth, in light of the congressional purpose that they be enjoyed by as much of the public as possible, the public interest is affected by how widely a successor license would distribute the benefits of hydroelectricity. *Id.*

Petitions for judicial review of Opinion No. 88 were filed by PG&E and numerous other privately-owned utilities. These petitions were eventually consolidated in the U.S. Court of Appeals for the Eleventh Circuit. The Cities of Bountiful and Santa Clara, among others, intervened in support of the FERC.

On September 17, 1982, the court of appeals affirmed the FERC's decision that the preference for public agencies applies whenever a new license is issued. *Alabama Power Company v. FERC*, 685 F.2d 1311. In affirming that decision the court rejected, as had the FERC, the argument that since Congress could not have intended that the term "new licensee" include the term "original licensee," the preference provided in Section 7(a) is inapplicable to original licensees. 685 F.2d at 1316. Under this argument, according to the court, the FERC's administration of the FPA would prove "confusing and sporadic" since the preference would only operate in some cases. *Id.* Moreover, since the only time the original licensee would not be issued a new license would be when the project was unprofitable,

this argument leads to an "absurd result." *Id.* Even more absurd in the court's estimation is the result when a State or municipality is the original licensee. In that case, the State or municipality would lose its preference if it sought a new license. *Id.* Finally, rather than undertake its own interpretation of the statutory language at issue, the court concluded that it should give "great deference" to the decision of the FERC. 685 F.2d at 1318.

INTEREST OF THE CPUC

For the reasons set forth in the accompanying motion for leave to file a brief as amicus curiae which is incorporated herein by reference, the CPUC has a vital interest in the outcome of the proceedings before this Court for review. If allowed to stand, the decisions issued in those proceedings by the FERC and the Eleventh Circuit may well result in an annual increase of many hundreds of millions of dollars in the rates charged the customers of privately-owned utilities providing service within California. As the duly authorized representative of those customers, the CPUC is legally and morally bound to speak out and support petitioners in their attempt to have those decisions reversed.

ARGUMENT

As all parties would agree, the nature of the preference to be provided public agencies depends on the meaning of the words of Section 7(a) "in issuing licenses to new licensees under section 15." To understand those words, one must, as directed by Section 7(a), refer to the use of the term "new licensee" in Section 15. As used in Section 15(a), that term is given a specific, unambiguous meaning by the

distinction drawn with the term "original licensee": the original licensee is the holder of the original, expiring license and the new licensee is anyone other than the original licensee. In the language of Section 15(a):

[T]he commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee. . . .

16 U.S.C. § 808(a).

Accordingly, when Sections 7(a) and 15(a) are read together, the phrase "in issuing licenses to new licensees under section 15" is made clear. Since a new licensee is anyone other than the original licensee, the preference provided public agencies under Section 7(a) applies only against applicants other than the original licensee—that is, it applies when only new licensees are in competition for a new license to be issued under Section 15. To read the phrase instead as including original licensees is to ignore the distinction drawn by Section 15(a).

By rejecting that distinction, the FERC was able to conclude that the preference for public agencies applies whenever a new license is issued. The contextual difference it suggested between "successive license terms" and "the single license term under consideration", however, simply makes no sense. Sections 15(a) and 7(a) both concern new licenses: Section 15(a) authorizes the FERC to issue new licenses and Section 7(a) prescribes in turn the preference to be given in issuing new licenses to new licensees. The context in each section is exactly the same. Nor is the absence in Section 7(a) of reference to original licensees per-

suasive evidence that Congress intended the term "new licensee" to have a different meaning than in Section 15(a). To the contrary, absence of such reference provides positive proof that Congress intended that preference not apply against original licensees. To reach the FERC's conclusion, one has to either ignore the phrase "to new licensees" or to read the word "new" as "any." In either case, the distinction provided in Section 15(a) would be given no effect.

As a consequence of the FERC's misinterpretation of the nature of preference, the review required to be performed of competing applications for a new license would be rendered meaningless. In Opinion No. 88, the FERC correctly identified the public interest as a complex and complicated subject, broad in its scope, varying with time and circumstance. The number of customers served by an applicant, the size of its electrical system, the economic costs and benefits of a particular project—all are factors which the FERC indicated should be considered in the determination of the public interest. To prove meaningful, therefore, review of competing applications should include a full evaluation of how their plans would "conserve and utilize in the public interest the water resources of the region."

By concluding that Congress intended that the preference for public agencies should apply whenever a new license is issued, however, the FERC transformed the limited remedy of preference into a facile means by which to decide tough cases. Thus, rather than determine which among competing plans would best serve the public interest, the opportunity is created to simply inquire whether the various plans are reasonably similar. Possibly, in the

rare case, competing plans may be fairly said to serve the public interest equally well; but in all cases, review should be full and complete.

Similarly, in its affirmation of Opinion No. 88, the court of appeals failed to come to grips with the nature of preference. In the first place, if preference is held to be inapplicable against original licensees, the FERC's review would prove neither confusing nor sporadic. Rather, in each case, the FERC would be required to conduct a comprehensive review of competing applications. Second, a fair chance for original licensees to receive a new license can hardly be considered an absurd result. Moreover, profitable projects can be taken away—for instance, if they were not well operated, if improvements are required, or if a competing applicant presents better plans. Most importantly, however, the court's error lies in its acceptance, without apparent resort to research and analysis, of the notion that preference is a ready substitute for meaningful review. Acceptance of that notion simply legitimates too much.

If allowed to stand, therefore, these decisions would cause retail customers of privately-owned electrical utilities to suffer a great and lasting injustice. By way of example, PG&E serves some 3.5 million customers. Twenty percent of its generating capacity is provided by hydroelectric projects licensed by the FERC. The annual value of the power generated by these projects is approximately \$800 million. In contrast, the City of Santa Clara, which has pending before the FERC an application for a new license to operate the Mokelumne River Project presently under license to PG&E, provides service to about 40

thousand customers. The rates it charges for such service are almost 50 percent lower than those PG&E charges its customers. Opinion No. 88, as affirmed by the court of appeals, would make possible the forced transfer of the Mokelumne River Project to Santa Clara without payment of its cost of replacement and without any showing that the public interest would be better served thereby. It would serve to increase rates for PG&E's customers and decrease them for Santa Clara's. Where would be the justice in that result?

On the other hand, if these decisions are set aside, States and municipalities will retain a fair opportunity to obtain hydroelectric power. In the first place, as preference customers of federal agencies and wholesale customers of privately-owned utilities, they already enjoy access to more than their proportionate share of such power. Moreover, either by exercising their powers of eminent domain under Section 14(a) of the FPA or by applying for new licenses under Section 15(a), public agencies can still seek to acquire hydroelectric projects. In the former case, they need only pay just compensation; and, in the latter, only demonstrate, as must competing original licensees, that their plans would better serve the public interest. The fairness of this scheme cannot be honestly denied.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be granted.

Respectfully submitted,

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No. 82-1346

U.S. Supreme Court, U.S.
L. R. D.
MAR 20 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

PACIFIC GAS AND ELECTRIC COMPANY, et al.,
Petitioners,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,
Respondents.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

**BRIEF AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

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**Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

**MOTION OF THE COUNTY OF FRESNO,
CALIFORNIA FOR LEAVE TO FILE BRIEF
AMICUS CURIAE, AND BRIEF AMICUS CURIAE
IN SUPPORT OF PETITIONERS**

Fresno County respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of Petitioners' position in this case.

STATEMENT OF INTEREST

Fresno County, California, is located in and extends across California's great Central Valley and up into the Sierra Nevada mountains. The Pacific Gas and Electric Company (PGandE) supplies electric power to citizens, cities, businesses and farms throughout Fresno County and much of the rest of northern and central California.

PGandE is a widely held public utility company regulated by the California Public Utilities Commission. PGandE and its predecessors have served Fresno County since nearly the turn of the century.

Agriculture is Fresno County's primary industry. In 1982 over \$1.9 billion worth of agricultural commodities were produced on County farms and ranches, making Fresno County the #1 agricultural producing county in the entire nation. Because the San Joaquin Valley is semi-arid, agriculture has long depended heavily on pumping to produce water for irrigation. The electric power provided by PGandE has made that pumping possible and with it the growth and prosperity of this County and its citizens. The City of Fresno, our county seat, has grown to become one of California's major cities. It was built on the County's agricultural base and the industry that has grown to supplement it. All of this growth has been heavily dependent on reliable and economical power from PGandE. Our County's future industrial growth and the employment opportunities such growth represents is even more dependent upon this reliable and affordable power.

Four of PGandE's federally licensed hydroelectric projects are located in Fresno County. One of them, the Haas-Kings River Project (FERC 1988) is even now involved in relicensing and is being sought by various outside "municipal" systems claiming a "preference" based on the Federal Energy Regulatory Commission ("Commission") decision at issue in this case. The benefits of those projects flow to Fresno County and its residents along with all of PGandE's other customers. All of PGandE's customers are financially at risk if the Commis-

sion's decision to implement a "preference" against them is put into effect.

SUBSTANCE OF THE BRIEF AMICUS CURIAE

1. The Commission and the Court of Appeals ignored the Act's goal of benefitting the public served by PGandE and other original licensees.

2. The language of the Act provides no municipal preference against a project's original licensee on relicensing.

3. The Commission and the Court erred in exalting what is, at best, an ambiguous "history" over the terms employed in the Act and in employing materials having no place in legitimate "legislative history".

REASONS FOR GRANTING THIS MOTION

Utility fuels costs must be passed on to the consumer. In California such costs are virtually a direct pass-through, with fuel costs now accounting for over half the typical electric bill. By the same token, any facility that can produce power without burning fossil fuel, like PGandE's licensed hydroelectric projects, directly benefits the company's customers. That has always been the primary advantage of hydro power. Any attack on PGandE's hydroelectric facilities is an attack on Fresno County and its citizens. The Federal Power Act was designed to promote the development of the nation's water resources by providing the maximum safety and security for private investment consistent with the public interest. Fresno County represents a critical element in that public interest, the public served by a company which took up the Federal

Power Act's invitation and developed its hydroelectric system under federal license.

This is a case of enormous importance to the people who pay power bills throughout the United States. Fresno County submits that those who represent the consuming public threatened by the Commission's decision (affirmed by the United States Court of Appeals for the Eleventh Circuit) should be heard in assessing the importance and the merits of this case and, on that basis, Fresno County respectfully requests permission to file this *amicus curiae* brief.

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**Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit**

**BRIEF OF AMICUS CURIAE
COUNTY OF FRESNO, CALIFORNIA**

STATEMENT OF THE CASE

The Pacific Gas and Electric Company (PGandE) filed a Petition for Writ of Certiorari (No. 82-1346) on February 10, 1983 seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in *Alabama Power Company, et al. v. Federal Energy Regulatory Commission*, 658 F.2d 1311 (11th Cir. 1982). Petitions relating to that decision have also been filed by other regulated public utility companies owning and operating licensed hydroelectric plants. (Petitions Nos. 82-1312, 82-1345). The Court of Appeals' decision upheld a Federal Energy Regulatory Commission (Commission) opinion to the effect that Part I of the Federal Power Act contains

a "preference" for municipally-run utility systems that runs against an hydroelectric project's original licensee and its customers when the project comes up for relicensing. Opinion 88, 11 FERC (CCH) ¶ 61,337.

INTEREST OF THE COUNTY OF FRESNO AND SUMMARY OF ARGUMENT

Fresno County's interest in this case is detailed in the preceding motion requesting leave to file this brief.

This brief points out that the interpretation advanced by the Commission and the Court of Appeals in this case totally ignores and runs directly counter to the Federal Power Act's plain intention to benefit and protect the public served by those developing and operating hydroelectric projects under federal license. It goes on to review the direct and straight-forward way in which the Act, on its face, excludes original licensees and their customers from the application of any "municipal preference" on relicensing. Finally, the brief examines the extraordinary way in which both the Commission and the Court misemployed "history" in this case to rewrite the terms of the Act.

ARGUMENT

I

THE COURT OF APPEAL ERRED IN FAILING TO CONSIDER THE PUBLIC SERVED BY LICENSEES LIKE PG&E AND THE ACT'S PLAIN INTENTION TO BENEFIT THAT PUBLIC

Part I of the Federal Power Act (16 U.S.C. §§ 791a-823) was enacted as the Federal Water Power Act in 1920. Its primary purpose was the encouragement of private investment in developing the water power potential of

the nation's water resources. *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 407-08 (1975); Cf. *FPC v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 251 (1954). The Act simultaneously provided that its licensees would be subject to sound regulation at either the state or federal level (See 16 U.S.C. §§ 812, 813), thus assuring that the benefits of hydroelectric power would indeed be passed on to the public they served.

In California and throughout the West the creation of a system designed to encourage and protect investment was essential, given the vast amounts of land still in federal hands. It was hoped that developers would come forward, would dedicate their projects to the service of the public they served, and, together, investors and customers would go forward to fully develop and utilize hydroelectric power in the public interest.

In California that is precisely what has happened. Without the power provided by PGandE much of Fresno County would be barely habitable; with that power our land has been abundant and our cities have thrived. Indeed, Fresno County has become the most productive agricultural area, not only in California, but in the entire nation.

With the Act's central goal and hoped-for result in mind, it would be strange indeed to find the Act's framers seeking to punish original licensees and their customers by awarding a "preference" on relicensing to someone else. Fresno County submits that the language of the Federal Power Act, read directly, will admit of no such strange result. Fresno County further submits that before the Act can be turned against the very people it was designed to protect and encourage, this Court must assure itself that such a

result is, in fact, compelled by the language and "logic" cited by the Commission in reaching that result.

The Federal Power Act deals with an issue central to the just operation of our federal system, that is, the way in which the federal government's control over public lands and navigable waters will be employed to benefit the public. The public served by those companies which incurred the risk and expense of creating the developments envisioned by the Act, is the public the Act sought to benefit through encouragement of such investment. The notion that under those circumstances Congress would have desired to create a relicensing preference *against* that public is extraordinary. Yet, neither the Commission nor the Court of Appeals considered that point at all.

Indeed the Court of Appeals seems to have been completely unaware of the scope of the case before it. The relicensing of PGandE's Mokelumne River Project (FERC 137) was one of (and by far the larger of) the two cases on which FERC founded its decision to decide this matter on a general basis. The Commission's decision, of course, was premised on the creation of a principle to be applied in all relicensing cases. The case before the Court of Appeals, in short, was to affect *every* licensed project in the country. Yet the Court of Appeals talks only of one project belonging to Utah Power and Light Company. PGandE Petition Appendix 5a ("Pet. App."). California is never mentioned; its interests are dismissed by reference to "another municipality that also sought a declaration of preference." *Id.* Nothing whatever was said, and quite plainly no consideration was given, to the position of the millions of public utility company customers throughout the country,

against whom the Commission and the Court were engaged in setting up a "preference." The Court of Appeals' decision to abstain from an independent analysis of the Act, in "great deference" to the Commission's action, must not prevent the review of a case so important to the functioning of the Federal Power Act and to the consuming public the Act was designed to benefit.

A concrete example will illustrate the potential effect of the Commission's decision on Fresno County and its residents. Our County and its residents currently enjoy the benefit of relatively low-cost electricity produced by the Haas-Kings project located on the Kings River in eastern Fresno County. They also enjoy the benefit of favorable water use agreements and a cooperative spirit with PGandE. Fresno County residents have supported the construction, improvement and operation of this power plant as customers and as shareholders of PGandE.

The Haas-Kings project is now up for relicensing by the Commission (FERC 1988). Competing applications have been filed by the project's builder and original licensee PGandE and by a consortium of public agencies consisting of the Sacramento Municipal Utilities District, the Northern California Power Agency,¹ and five Southern California cities.² The consortium of public agencies is claiming the relicensing preference which is the subject of this case and thereby attempting to wrest control of Haas-Kings away from PGandE.

¹Cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara and Ukiah and the Plumas-Sierra Electrical Cooperative.

²Cities of Anaheim, Azusa, Banning, Colton, and Riverside.

The importance of this to Fresno County and its residents is that the consortium is attempting to *divert* the low-cost power produced by Haas-Kings *away* from Fresno County and other PGandE customers for the exclusive benefit of their own customers. In short, the customers who have financially supported the project will lose continued benefits of low-cost power and cooperative water use agreements while residents of others areas of California, fewer in number, and far removed from this locale, people who have not expended a nickel on the project, will reap the benefits, all in the name of "municipal preference".

The practical consequences for Fresno County and its residents, as well as for all others similarly served by investor-owned utilities, are that they will face huge increases in electricity costs as PGandE loses a project that used no fuel and acts to replace the lost power. They will also face great uncertainty with respect to cooperative management and use of the water resources which make the project possible. As an alternative, Fresno County could be forced to form its own municipal utility agency to compete with and protect itself against outside "municipal" agencies such as the consortium. Fresno County has no interest presently in going into the electric utility and water management business and submits that it should not be placed in a position of being forced to do so in an effort to retain for its citizens the low-cost power and water use benefits of PGandE's Haas-Kings hydroelectric project.

Contrary to the position taken by the Commission and the Court of Appeals, we believe these potential effects of the Commission's opinion and the Court's decision are the

“absurd results” in this case. We submit that creating the potential for such discriminatory and illogical results frustrates the intent of Congress in adopting the Federal Water Power Act and is contrary to the broad public interest Congress intended be served.

II

THE LANGUAGE OF THE ACT PROVIDES NO MUNICIPAL PREFERENCE AGAINST A PROJECT'S ORIGINAL LICENSEE ON RELICENSING

The most puzzling aspect of this case is precisely how the Commission decided there was some confusion in the language of the Act. The Commission's arguments about “contexts of usage” and about words defined in contradistinction to one another necessarily including one another, are virtually incomprehensible. PGandE Pet. App. 59a-64a. The Court of Appeals added no explanation. It jumped over the “hurdle” of the Act's language just by deciding that the Commission's interpretation (itself not based on the Act's language at all) was “reasonable.” PGandE Pet. App. 13a. All this in a case where the Act is neither complicated nor unclear!

The subject matter of this case is the relicensing of hydroelectric projects developed under federal license in situations where the federal government itself is not seeking to take over the project.

Section 15(a) of the Act (16 U.S.C. § 808(a)) deals with such relicensing situations. Logically enough, it first provides that:

(1) “. . . the Commission is authorized [1] to issue a new license to the original licensee upon such terms and conditions as may be authorized. . . .”

Since the original licensee invested in the project as invited by the Act and developed the project in accordance with the Act, it is obvious that on relicensing the original licensee must occupy a specific position as the most likely recipient of a new license. The Act does, however, go on to describe another class of applicants who may be considered as alternative candidates for the project's license:

“. . . or [2] to issue a new license under said terms and conditions to a *new licensee*”

Again, this second category of applicants is unexceptional. If the old licensee is unfit or unable or unwilling to go on, then the logical course is to choose someone else, a “new licensee.” It is equally open to such strangers to the project to attempt to prove that they will better satisfy the Act's requirements for the comprehensive improvement and utilization of the resource. Cf. Section 10(a) (16 U.S.C. § 803(a)).

Against the structure of those relicensing provisions, the various municipally-run systems who initiated this case claimed that they were entitled to a “preference” against the original licensee and its customers.

But the section they rely upon says no such thing. Instead it confines the operation of any municipal preference on relicensing to apply only against “new licensees” as defined in Section 15 and not against the original licensee. Section 7(a) provides that preference is to be given to applications by states and municipalities:

“[1] In issuing preliminary permits hereunder or [2] licenses where no preliminary permit has been issued and [3] in issuing licenses to *new licensees* under section 15 hereof” (16 U.S.C. § 800(a))

The words selected quite clearly exclude the original licensee. Section 15 makes this exclusion inevitable. The term "new licensee" is used three times in that section as a specific term of art describing those *other than the original licensee* who may receive a license. The same precise distinction is drawn in Section 22 and even in Section 7 itself, 16 U.S.C. § 815, 16 U.S.C. § 800(c).

Under any conventional, common sense system of statutory construction, the Act was plainly designed and written to exclude the original licensee from any operation of municipal preference on relicensing.

Fresno County submits that the logic of excluding the original licensee is manifest in the intent and structure of the Act. The Act was intended to encourage investment in and foster development of hydroelectric power projects. Assuring the investor a fair shake on relicensing was a minimal element in that program of encouragement. The Act was intended to advance the interests of those consuming the power produced in licensed projects. A proposal that some group of outside consumers would have preference over those for whom the project was built, and by whom the project was supported, would collide directly with the Act's primary purposes of rewarding investment, encouraging orderly development, and serving the broad public interest.

As a further element in the analysis of the language in question, it is only necessary to note that the exclusion of the original licensee from the municipal preference on *relicensing*, nicely replicates the exclusion of a private preliminary permit holder from the municipal preference on *initial licensing*. If the preliminary permit holder, with

a minimal investigatory investment, deserves such protection, protection for the original licensee and its customers, those who have invested everything that makes up the project, cannot be evaded.

Finally, we note that under the Commission's interpretation of section 7(a) the words "to new licensees" become superfluous and are effectively read out of the Act. This is contrary to the long-established rules that the legislature is presumed to have used no superfluous words in a statute, *Platt v. Union Pacific Railroad Co.* 99 U.S. 48 (1878), and every word of a statute must be given effect, if possible. *U.S. v. Gooding*, 25 U.S. (12 Wheat.) 460 (1827); *U.S. v. Menasche*, 348 U.S. 528 (1955). The Commission's and the Court of Appeals' failure to apply these elementary rules of statutory construction is mystifying.

The Commission, and even more plainly the Court of Appeals, ignored the language of the Act, its plain logic, and the established rules of statutory construction in making their tortured interpretations.

III

THE COMMISSION AND THE COURT ERRED IN EXALTING WHAT IS, AT BEST, AN AMBIGUOUS "HISTORY" OVER THE FACTS OF LEGISLATIVE USAGE AND IN EMPLOYING MATERIALS HAVING NO PLACE IN "LEGISLATIVE" HISTORY

Beyond the Court of Appeals' failure to review the Commission's overt avoidance of the Act's language, there is the questionable "historical" material on which both the Commission and the Court based their interpretations.

Statutes are written and enacted to be read and acted upon. That is the foundation of the rule that the words selected by Congress take precedence over *all* interpretative devices. *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845); *U.S. v. Temple* 105 U.S. 97 (1881); *Gemsco, Inc. v. Walling* 324 U.S. 244 (1945). The political process, by nature, is characterized by much speech making for effect, testimony for influence, and compromise for enactment. The more extended the struggle, the more necessary reliance on the words actually selected becomes, for it is only in those words that all the battles and bargains that went before are transformed into law. It is readily apparent that the process that produced the Federal Water Power Act was precisely the kind of extended effort that makes the language finally selected the only sure gauge of the agreement struck.

Turning their backs on these elementary facts of legislative analysis, the Commission and the Court of Appeals founded their interpretation on an "historical" review that contains all the ambiguity lacking in the Act itself.

The Commission's historical theory is that the words "in issuing licenses to new licensees under Section 15 hereof" were meaningless because, before they were added, a municipal preference "silently" applied to relicensing and the original licensee. PGandE Pet. App. 66a. This despite the fact that the quoted words are the *only* reference to relicensing in Section 7(a). The Commission's theory leads it to accuse the members of the House Committee considering the bill of "fail[ing] to realize" what was in the bill when they specifically described it as *not* containing any relicensing preference. PGandE Pet. App. 36a, n. 21. It

also required the Commission to complain that a Conference Committee “obscured” the bill by making clear its understanding that, prior to amendment, the municipal preference did not have any “silent” application to relicensing. PGandE Pet. App. 39a. The Commission caps its “silent” application theory by explaining away the fact that the words in question were added to extend the preference to apply against “new licensees” on relicensing, by agreeing that the Act’s language before amendment “appeared” to have no application to relicensing. PGandE Pet. App. 39a.

The Commission’s theory thus depends on acceptance of at least three points where the Commission must fight, in turn, with the history of committee analysis, the results of committee action, and the very language of the bill it cites. The Commission’s decision is plainly premised, not on history, but on theory—a theory contradicted by the very history quoted to support it. Such a strained and internally ambiguous “history” cannot be used, as the Commission did here, to rewrite Congress’ words. *Gemsco v. Walling*, 324 U.S. 244, 260 (1945).

Against the effort by the Commission to re-make history in the image of its own desired result, the unadorned facts of legislative usage presented by PGandE stand in stark contrast.

The question in this case is one of how words were used. PGandE’s petition recounts the unchallenged evidence that the Congress which placed the words “new licensee under Section 15 hereof” in Section 7(a) consistently and repeatedly used and understood the words “new licensees” to describe a category that excluded the original licensee.

PGandE Petition, 14, 15. This is evidence, *on the record*, of what the words meant. The meaning of the words emerges directly from their use, and the facts of their use require no reliance on the "truth" of what the speaker was addressing or any attention whatever to his political motives, party, or bias. Fresno County submits that the Commission relied on nothing but hearsay, speculation and ambiguity; PGandE relies on the uncontroverted facts of actual usage. If there is to be any sound structure to the manner in which federal agencies and courts use legislative history, the course selected by the Commission and the Court of Appeals in this case must be corrected.

Even beyond the manifest error in the Commission's relying on its "silent" theory of legislative history while ignoring the actual facts of Congressional usage, there is the questionable employment, by both Commission and Court, of materials wholly *outside* the legislative history to now interpret and control the Act.

The Commission embarked on its search for the "silent preference" with a "memorandum", supposedly written by one O. C. Merrill, before any bill was introduced. PGandE Pet. App. 32a. There is no citation given for this "document." *Id.* It goes on to quote a "bill," itself never introduced, supposedly drafted by the same Mr. Merrill. PGandE Pet. App. 33a. It is on those items, neither of which ever figured in any way in the consideration of water power legislation by *Congress*, that the Commission builds its entire "historical" edifice. But where did these items, exalted by the Commission before the words of the Act itself, come from? The question becomes even more pressing as the Commission decision continues, for its pulls out

and cites even more "Merrill memoranda." PGandE App. 45a, 46a. These documents supposedly describe the Act after the words "in issuing licenses to new licensees under Section 15 hereof" were added. The decision does not pretend that their author had anything to do with the amendment, but his hearsay description of it is cited as authoritative. PGandE App. 45a. But the essential question remains unanswered, where are these supposed pieces of "legislative history" coming from? Rather than answer that question, the Commission compounds the problem by also citing private correspondence between one Gifford Pinchot and a Senator Jones, again with no source. PGandE Pet. App. 42a and 43a.

The Court of Appeals, surprisingly, is of no help whatever in answering these questions. It repeats the Commission's use of those materials (PGandE Pet. App. 10a, 12a) but cites as their source only "reprinted in City of Bountiful, Utah" [The Commission Decision]. The answer to these questions comes only from the petitioners:

"Petitioners first learned of the existence of the Merrill and Pinchot writings when the Commission retrieved them from files and used them in this case and petitioners obtained copies only pursuant to a 'freedom of information' request." PGandE Petition 21, fn. 31.

Fresno County submits that this is an absolutely intolerable abuse of the process of statutory interpretation. The laws of the land, including the Federal Power Act, are widely printed and readily accessible to all who would follow and rely upon them. As soon as efforts are made to go beyond the language as enacted and into its legislative history, uncertainty and inaccessibility become sig-

nificant problems. The legislative history of Acts like the the Federal Water Power Act can be found, if at all, only in the largest legal libraries. Even there, after any considerable passage of time, the record is seldom a complete one. That is part of the reason why our system of laws has always depended on the principle that what Congress enacts is the law and that the miscellaneous recorded legislative materials that preceded enactment are to be consulted *only* on those rare occasions when there is some genuine facial ambiguity. *Camminetti v. U.S.* 242 U.S. 470, 485 (1917).

In this case the Commission and the Court of Appeals have kicked over all the traces. Now the interpretation of federal statutes is to depend on internal files and notes created by Administration employees or even private citizens. These are items having no reflection in the legislative record, created for undisclosed motives, kept or destroyed according to no known system, and buried deep in the recesses of the federal bureaucracy. This is apparently to happen regardless of the time elapsed, regardless of the lack of authentication of either the documents or the system under which they were kept, and regardless of their existence wholly outside what Congress itself saw and heard in enacting the Act.

Fresno County believes that the decision by the Court of Appeals to make the meaning of federal statutes depend on whatever private memoirs or notes may show up next, must be reviewed. Neither the Commission nor the Court of Appeals cited one iota of authority for this new system of statutory revision. Fresno County submits there is none.

CONCLUSION

Fresno County will not reiterate the arguments made by petitioners against the "great deference" shown by the Court of Appeals to the Commission's analysis. It would be hard to imagine a case less appropriate for abstention from judicial review. With that abstention by the Court of Appeals, this Court became the last hope for judicial review. On behalf of its own citizens, the millions of other consumers served by PGandE, and all those similarly situated throughout the United States, Fresno County respectfully requests this Court review this case and correct the errors it so clearly contains.

WHEREFORE, amicus curiae Fresno County respectfully prays that this Court grant the writ of certiorari and reverse the decision below.

Respectfully submitted,

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